91-411

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT "BOSKO" STRUMINIKOVSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

ALLAN A. ACKERMAN
Counsel of Record
JOELLE H. HOLLANDER
2000 North Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorneys for Petitioner
ROBERT "BOSKO" STRUMINIKOVSKI

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTIONS PRESENTED BELOW

I.

Whether the decisions in *Brookhart v. Janis*, 384 U.S. 1 (1969) and *United States v. Cronic*, 466 U.S. 648, 656 (1984) compel the conclusion that the Fifth and Sixth Amendments proscribe defense counsel from conceding the guilt of a non-guilty pleading client?

II.

Whether the decision below fuels a split in circuits as to whether defense counsel, in defiance of the Sixth Amendment, may assert a defendant's guilt in a federal criminal case?

III.

Whether the decision below defied precedent from this Court disallowing Courts of Appeals from engaging in factfinding—in that the decision below independently found strategy-approval amounting to a waiver of Bosko's Sixth Amentment right to effective counsel, based on a post-trial letter?

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PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on May 3, 1991.

OPINION BELOW

The final judgment of the trial court was not printed in an official reporter.

The decision of the United States Court of Appeals for the Seventh Circuit is reported as *United States v. Dominic Simone, Robert "Bosko" Struminikovski, et al.*, 931 F.2d 1186 (CA 7, 1991). The Court of Appeals' decision was rendered on May 3, 1991. The opinion and judgment below is reprinted in the appendix to this petition, *infra*, at 1a-28a.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit, from which review is sought, was entered on May 3, 1991. A timely petition for rehearing was filed in the Court of Appeals and denied on June 5, 1991 (App. 29a).

This Court has jurisdiction to review the judgments of the Court of Appeals under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V, provides in part:

> "No person shall . . . be deprived of life, liberty, or property without due process of law . . ."

United States Constitution, Amendment VI, provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence".

STATEMENT OF THE CASE

A. *Procedural History*

The defendant was charged in a second superseding indictment with participation in a continuing criminal enterprise, use of a firearm in relation to drug trafficking, and attempted bribery. (21 U.S.C. §848, 18 U.S.C. §924(c), §201). The continuing criminal enterprise charge alleged drug trafficking in violation of 21 U.S.C. §841(a)(1), 21 U.S.C. §845b(f), and §846.

Represented by retained counsel, Bosco (and seven co-defendants) proceeded to a joint jury trial on August 1,

1988. The jury returned guilty verdicts as to all defendants on all counts on September 28, 1988. Forfeiture verdicts were returned against Bosko on September 30, 1988.

Upon direct appeal, the Court of Appeals for the Seventh Circuit affirmed Bosko's convictions. *United States v. Simone*, 931 F.2d 1186 (7th Cir. 1991). On June 5, 1991 a panel of that court denied Bosko's petition for rehearing *en banc*.

B. *Statement of Facts*

Represented by retained counsel, Bosko stood trial in an eight-week long joint proceeding. During the course of the trial, evidence established a parade of characters variously involved in Jello wrestling, drug trafficking, and conspiracy. At the ostensible head of the alleged organization was Bosko Struminikovski, the primary trial defendant. Spanning from late 1984 through 1987, the evidence tended to show that $25 bags of cocaine were being sold out of restaurants in Cicero, Illinois; Bosko was alleged to have been travelling the restaurant circuit in the western suburbs of Chicago distributing small quantities of cocaine in restaurant parking lots and restrooms.

The substance of the alleged conspiracy commenced in 1984 when Bosko and girl-friend Amanda Roland travelled to Florida and arranged for the transport of cocaine from Florida to the Chicagoland area. (Tr. 670-71). Several weeks later, Amanda drove a car from Florida up to Chicago, in the back seat was something which looked like a plastic-wrapped football. Bosko asked Amanda whether she had ever seen a "key" before. (Tr. 675). Thereafter, Bosko commenced a course of conduct involving daily distributions of cocaine. An individual named "Louie" and others sold drugs at the United Grill. (Tr. 1239, 1242-53).

The evidence showed that during November and December of 1985 Louie worked the United Grill during the day while Bosko serviced cocaine customers at night. This arrangement lasted until early 1986 when venue changed to the La Petite restaurant one block away. (Tr. 2611-22).

Louie opened La Petite and worked the restaurant during the day. The coke business was bustling to the point where trial testimony showed that while La Petite appeared to sell no food, there were very real traffic jams most weekends. (Tr. 2586-2600). After La Petite closed, Bosko rode the restaurant circuit, aided by several others. (Tr. 2000-11, 2727-32, 2964-70).

Bosko's organization continued unhindered until some time in February 1986, when DEA agent Kelly entered the operation as a Minneapolis lawyer and drug customer of Bosko. (Tr. 3228-36). Their relationship progressed to the point where Kelly communicated his desire to purchase $67,000 worth of cocaine. (Tr. 3305). On August 28, 1987, Amanda delivered a "potato sack" to Kelly's hotel room (Tr. 3337); Kelly tendered $67,000 to Amanda, who suffered an immediate arrest. (Tr. 3337-38). Shortly thereafter Bosko was arrested. (Tr. 3343).

During trial summation, Bosko's attorney declared repeatedly that Bosko was a dope dealer, systematically piling all the evidence of that dope dealing in front of Bosko while extolling his guilt. (Tr. 5167, 5172, 5173, 5174, 5175, 5171, 5192, 5199, 5176, 5178, 5183, 5148, 5185, 5188, 5189, 5190, 5191, 5193, 5194, 5195, 5196, 5198, 5201, 5202, 5216, 5217).

Ultimately, the jury heeded defense counsel's argument and convicted Bosko on all counts. Bosko was sentenced to a total of 23 years in custody along with fines totalling $140,000. (R. 598).

REASONS FOR GRANTING THE WRIT

The following excerpts of closing argument *on Bosko's behalf* merit plenary review of the submitted reasons for granting the writ.

> The truth of the matter is, like I told you, my client sold cocaine. And on March the 12th, 1986 he did sell this cocaine to Tom Kelly. (Tr. 5173).
>
> * * * *
>
> All right. So that goes to Bosko and that is the subject *Count Seven.* And you can find him guilty of that because it happened, and Tom Kelly said so and I believe Tom Kelly.
>
> Now, then *again on May 12,* 1986, Tom Kelly bought some cocaine when he was using the name Jim from Minnesota. And he bought from—he bought it from—I am sorry, this was the wrong date. *He bought it on April 29th. I am sorry I am not paying too much attention to this because I don't have any quarrel with this stuff.* On May 29, 1986 he bought it from him. He didn't buy it at his house, and that is something I think you should keep in consideration. The tape also says when him and Tom Kelly, "No, I don't want you to come to my house. My parents are there." (Tr. 5174, emphasis added).
>
> * * * *
>
> I am not quarreling with *Count Eight.* Bosko sold it out of his own pocket to Tom Kelly. And there is no quarrel with that. If you want to find him guilty on Count Eight, *please be my guest. That is something he is guilty of.* Like I said when I started, only find him guilty of what he is guilty of. (Tr. 5176; emphasis added).
>
> * * * *
>
> But in any case all of the rest of this cocaine, all of the rest of this cocaine came from Bosko. (Tr. 5178).
>
> * * * *

And these guns also apply to Bosko. And they don't prove anything against anyone else. (Tr. 5185).

* * * *

There is another count about guns and we haven't fought with that at all from minute one. It says my client was convicted of a felony in Illinois. And he was convicted of a felony in Illinois. As a matter of fact, he pled guilty when he was charged with that. He was in possession of a firearm. Okay. So what? *That is what we said absolutely true, go back, find him guilty. No problem. I am not asking you to find him not guilty.* I am asking you for justice and that is justice. (Tr. 5188; emphasis added).[1]

* * * *

When he pulled into the parking lot, Bosko was here, he could have rang bells. Bosko's cocaine. We want Bosko's cocaine. Everybody ran to Bosko. He had them stand in line. And he took the cocaine out of his pocket, and he sold it. And he put the money into his other pocket. It was a real simple operation. He gave them cocaine. They gave him money. That was it. (Tr. 5189).

* * * *

. . . and this exhibit proves Bosko sold cocaine. (Tr. 5189-90).

* * * *

These tapes are all Bosko, except for this videotape, which all—it talks about is Bosko and the fact that he sells cocaine out of his pockets at restaurants five times a night. So let's put this on Bosko's pile. (Tr. 5191-92).

* * * *

---

[1] Referring to Counts 17 and 18. Count 17, per 18 U.S.C. §924(c) calls for a consecutive minimum 5 year sentence. Count 18 per 18 U.S.C. §922(g)(1) carries a 10 year sentence.

> Now, this cocaine was found in Bosko's basement. This cocaine was found in Bosko's upstairs bedroom. This heroin was found in Bosko's upstairs bedroom. This morphine and cocaine were found in Bosko's living room. Bosko had all of these things in his house. None of these other people had it in their houses. Nothing was found, none of these things were found in anybody else's house. These were all found in Bosko's house and Amanda's house. What does it show? Bosko was in possession of these things and Bosko sold cocaine himself. (Tr. 5194).
>
> * * * *
>
> I know this. My client sold cocaine out of his pockets every single night just about at five restaurants, stayed up all night long, driving around, then came home, slept, got up, packaged the cocaine, counted the money and went out again. He sold it at the United Grill. He supposedly kept it at the ceiling of the United Grill, yet the owner of the United Grill is not charged in this case. (Tr. 5201, 5202).
>
> * * * *
>
> And I will ask you now find my client guilty of the things that he did. (Tr. 5216).
>
> * * * *
>
> Please find my client guilty of those things that he should be found guilty of. Find him not guilty of those things he should not be guilty of. (Tr. 5217).[2]
>
> * * * *

During the government's rebuttal summation, *absent defense objection*, the following appears:

> Bosko Struminikovski at this late hour on the last day of trial has made your job somewhat easier *by*

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[2] Defense counsel told the jury that Bosko probably was not guilty of Counts 3, 4 and 5. (Tr. 5204, 5206, 5207). The total cumulative weight of the cocaine in those counts was approximately 8 grams.

conceding these counts, counts 7, 8, 9, 11, 13, 14, 15, 16, 18. (Tr. 5321).[3]

I.

WHETHER *BROOKHART v. JANIS* AND *CRONIC v. UNITED STATES* COMPEL THE CONCLUSION THAT THE FIFTH AND SIXTH AMENDMENTS PROSCRIBE DEFENSE COUNSEL FROM CONCEDING THE GUILT OF A NON-PLEADING CLIENT?

The essence of this case questions whether Due Process will allow defense counsel to steadfastly argue the guilt of his not-guilty-pleading client before judge and jury. Based on this Court's decisions in *Brookhart v. Janis*, 384 U.S. 2, 7-8 (1969) and *United States v. Cronic*, 466 U.S. 648, 656 n.19 (1984) such practice directly violates both Fifth and Sixth Amendment protections.

In the instant case, Bosko rejected the notion of a guilty plea in favor of a trial with all the trimmings—including his right to put the prosecution to its proof on each count alleged. Yet during summation, his trial counsel *told the jury to find Bosko guilty*, the equivalent of an unauthorized 11th hour guilty plea in complete derogation of Bosko's fundamentally personal choice on a fundamental constitutional right. See *Wainwright v. Sykes*, 433 U.S. 72, 93 n.1

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[3] Counts 7, 8, 9, 11, 14 and 15 were charged per 21 U.S.C. §841(a)(1) carried potential penalties of 15 years per count or 90 years in custody; count 13 charged a violation of 18 U.S.C. §201(b)(1) (attempt bribery) and that offense carries a permissive 5 year custodial sentence. Counts 17 and 18 charged federal weapon violations; the §924(c) count compelled a 5 year consecutive sentence while the §922(g)(1) count (felon in possession of a firearm) carries a 10 year custodial sentence.

Hence the cumulative permissive penalties on the "conceded or stipulated" counts total 105 years.

(1977) (Burger, J., concurring). Defense counsel in effect made a *de facto* waiver of that right by *repeatedly conceding* Bosko's guilt, thereby waiving a right which only Bosko could exercise.

In the arena of a criminal process, the entry of a not-guilty plea automatically triggers a panoply of constitutional rights, not the least of which is the State's burden of proof beyond a reasonable doubt. *Leland v. State of Oregon*, 343 U.S. 790, 794 (1952). Effective representation of a criminal defendant requires counsel to hold the State to that "heavy burden", even when no theory of defense is available. *Cronic*, 466 U.S. at 656 n.19.

Thus, the absolute guarantee of an adversarial truth-finding mission and zealous prosecutorial proffering of a constitutionally sufficient quantum of proof are concomitant to the entry of a not-guilty plea. Indeed, the entry of a not-guilty plea is so basic, yet carries such weighty implications, that its exercise is *absolutely personal* to the accused. *Wainwright*, 433 U.S. at 93 n.1 (Burger, J., concurring); *Galowski v. Murphy*, 891 F.2d 629, 636 (7th Cir. 1989), *cert. den.* ____ U.S. ____, 110 S.Ct. 1953 (1990); see also A.B.A. Standards for Criminal Justice, Defense Function, Std. 4-5.2(a) and commentary (1980).

Upon *waiver* of the above in favor a guilty plea, however, Due Process mandates a voluntary waiver entered of an intentional volition. See *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969); see also *Brookhart*, 384 U.S. at 9 (Harlan, J. concurring) (noting the Due Process overtones on the entry of a guilty plea). Federal rules direct the district court to conduct an on-the-record inquiry delving into the accused's understanding and intention. Fed. R.Crim.P. 11(c)(d) (1991); see also *Boykin*, 395 U.S. at 465-467; *Kercheval v. United States*, 274 U.S. 220, 222-23

(1927). The purpose is manifold: to make a competent determination of voluntariness, and to render a complete record of the factors relevant to that determination. *McCarthy v. United States*, 394 U.S. 459, 465 (1969).

These goals are "undermined" to the extent that the district court judge "resorts to 'assumptions' not based upon recorded responses to his inquiries." *Id.* at 467.[4] Moreover, in the absence of a clear and unmistakable on-the-record waiver of a defendant's fundamental Fifth and Sixth Amendment rights, *waiver-conjecture will not be presumed from a silent record.* See *Barker v. Wingo*, 407 U.S. 514, 525-26 (1972); *Boykin*, 395 U.S. at 242.[5]

In light of the above, this Court has specifically rejected *de facto concessions of guilt* by defense counsel in derogation of a defendant's unmistakable not-guilty plea. In *Brookhart*, this Court vacated the denial of state habeas relief where *Brookhart* pleaded not guilty but his trial counsel "agreed" to a *prima facie case*, free from contest or cross-examination. 384 U.S. at 2-3. While noting the *presumption against waiver of constitutional rights*,

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[4] See generally, *United States v. Lumpkins*, 845 F.2d 1444, 1448 and n.5 (7th Cir. 1988) (while reviewing requirements of Rule 11 admonitions, court notes that "*any* noncompliance is reversible error"); *United States v. Cusenza*, 749 F.2d 473, 475-76 and n.3 (7th Cir. 1984) (same); *United States v. Frye*, 738 F.2d 196, 199-200 (7th Cir. 1984) (discussion of the requirement of a knowing and intelligent guilty plea); *United States v. Berkowitz*, 927 F.2d 1376, 1400 (7th Cir. 1991) (Ripple, J. dissenting) (importance of admonitions in connection with waiver of counsel at trial) (*cert. ptn. filed* 6-12-91 No. 90-8342).

[5] Indeed, a district court need not accept even a voluntary defense-proffered waiver. See, e.g. *Wheat v. United States*, 486 U.S. 153 (1988). See also, *United States v. Severino*, 800 F.2d 42, 45 (2nd Cir. 1986), *cert. den.* 479 U.S. 1056 (1987) (courts *need not* accept all constitutionally valid waivers).

the Court held that trial counsel cannot waive his client's constitutional right to enter a plea of not guilty. *Id.* at 7.[6]

Clearly the question boils down to the very fundamental nature of the plea itself—it is inherently personal to the accused—it cannot be exercised by anyone other than the accused—it cannot be circumvented even by counsel for the accused. Yet that is exactly what happened at trial below. In complete derogation of Bosko's not guilty plea, and without any change of plea or admonitions by the trial judge, Bosko's trial counsel pleaded him guilty to nine federal offenses for which the government bore the responsibility of proving him guilty beyond a reasonable doubt. Such "advocacy" cannot comport with the concept of fair and due process.

By way of analogy, Bosko points to *United States v. Vargas*, 920 F.2d 167 (2nd Cir. 1990), for the proposition that invocation/waiver of a *fundamental right* is strictly personal to the accused, and counsel's conduct (*even unhampered by the defendant*) *cannot* serve to explicitly or implicitly waive the defendant's rights.

In *Vargas*, defendant-appellant argued ineffective assistance of counsel on appeal stemming from his attorney's advice against testifying and failure to call him as a witness. 920 F.2d at 170. Receiving the issue on such a limited appellate basis, the Eleventh Circuit restricted itself to holding that such advice was not unreasonable, yet cautioned that defendant's failure to object to counsel's per-

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[6] The Illinois Supreme Court also shares this dim view of defense counsel selling a client's guilty plea short—in favor of a stipulated bench trial. In *People v. Horton*, 143 Ill.2d 11, 570 N.E.2d 320, 325 (1991), defense counsel stipulated to the sufficiency of evidence, necessitating guilty plea admonitions.

formance would not constitute waiver of his constitutional right to testify. *Id.*

Bosko's argument *against* constitutional waiver based on hindsight and perceived defendant-acquiescence gathers strength in analogies borrowed from the Fourth and Fifth Amendments. See *United States v. Shaibu*, 920 F.2d 1423, 1425-26 (9th Cir. 1990) (Ninth Circuit rejected the notion of "implied consent" in the realm of a warrantless search of the defendant's home).

A related concept prevents *retroactive waiver*, mandating that constitutionally sufficient consent precede the invasive search. See *United States v. Melendez-Gonzalez*, 727 F.2d 407, 410 (5th Cir. 1984) (Fifth Circuit reversed defendant's drug conviction based on warrantless search of his car, refusing to justify the search based on retroactive application of a later signed consent). See also *Holloway v. Wolff*, 482 F.2d 110, 115 (8th Cir. 1973) (where consent to search home was obtained *after* the illegal entry and search took place, such "consent" could not properly sustain admission of fruits into evidence).

The same principle holds true in the area of Fifth Amendment privilege. In *Oregon v. Elstad*, 470 U.S. 298, 306 n.1 (1985), this Court rejected a retroactive application of *Miranda* warnings to defendant's previous unwarned oral inculpatory statements. In *Elstad*, defendant's unwarned statement to police led to a trip to the station house, where proper *Miranda* warnings were supplied and *Elstad* gave a signed confession. *Id.* at 300-01, 105 S.Ct at 1288-89.

While arguments in the appellate courts and Supreme Court focused on the admissibility of the second statement, the Supreme Court specifically noted that "[i]t has never been remotely suggested that any statement taken

from Mr. Elstad without benefit of *Miranda* warnings would be admissible". *Id.* at 307 n.1. Thus, reasoning by implication, it is clear that the first, unwarned statement was not cleansed by any retroactive application of the subsequent *Miranda* warnings.

The fundamental right to an adversarial process which conforms to the dictates of the defendant's plea of not guilty is elemental to the notion of Due Process. Without careful crafting of a defense which adheres to that plea, the fundamental guarantees inherent in the Fifth and Sixth Amendments are rendered hollow indeed. Plenary review by this Court is necessary to reinforce the holdings in *Brookhart* and *Cronic*, so as to insure that the entry of a not-guilty plea carries its intended weight.

II.

WHETHER THE DECISION BELOW FUELS A SPLIT IN CIRCUITS AS TO WHETHER DEFENSE COUNSEL, IN DEFIANCE OF THE SIXTH AMENDMENT, MAY ASSERT A DEFENDANT'S GUILT IN A FEDERAL CRIMINAL TRIAL?

> A criminal defendant has a constitutional right to expect during trial that his attorney will, at all times, support him, never desert him, and will perform with reasonable competence and diligence. Defense counsel in this case fell short of this modest standard.

Wiley v. Sowders, 647 F.2d 642, 651 (6th Cir. 1981), *cert. den.* 454 U.S. 1091 (1981).

* * * *

The query stands: whether defense counsel renders competent representation—indeed representation *vel non*—to his not-guilty-pleading client while repeatedly *arguing his guilt*, all without license gained by any recorded acquies-

cence or consent? Bosko respectfully submits that such is contrary, indeed antithetical, to the very function of defense counsel (whether retained or appointed) in a criminal case. It is undoubtedly established that "the Constitution entitles a criminal defendant to a fair trial, not a perfect one." *Rose v. Clark*, 478 U.S. 570, 579 (1986) (*quoting Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986); *United States v. Haddon*, 927 F.2d 942, 949 (7th Cir. 1991). Inherent in a fair trial is the constitutional guarantee of effective representation. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).[7]

As such, Bosko submits that the notion of proceeding to trial with counsel on the strength of a not guilty plea, and putting the prosecution to its proof on *every element of every count charged*, hardly approximates a legal Don Quixote tilting at windmills (tribunals) in search of a perfect trial. Rather, it is an elemental cornerstone of criminal jurisprudence which is essential to a *fair* proceeding, and out of the realm of protected trial strategy. See *Strickland*, 466 U.S. at 689, 104 S.Ct at 2065.

A fair proceeding, however, was decidedly denied Bosko at trial, by virtue of his counsel's closing argument urging Bosko's undoubtable guilt. (See Tr. 5173-74, 5176, 5178, 5185, 5188-92, 5194, 5201-02, 5216-17). Such arguments ranged from straight out declarations that Bosko sold dope (Tr. 5173) to exhortations of "*[i]f you want to find him guilty on Count Eight, please by my guest. That is something he is guilty of.*" (Tr. 5176). The argument was illustrated by defense counsel piling government dope ex-

[7] While setting out the two-prong test for ineffective assistance of counsel, *Strickland* noted that the issue is a mixed question of law and fact. 466 U.S. at 698.

hibits on the defense table in front of Bosko. (Tr. 5171, 5173, 5174, 5192, 5199).

Not surprisingly, the jury returned guilty verdicts against Bosko on all counts, and he was ultimately sentenced to a total of 23 years in custody along with fines totaling $140,000. (R. 598).

The appellate court ultimately affirmed Bosko's conviction, notwithstanding counsel's "stipulation of Bosko's guilt to certain counts". *United States v. Simone*, 931 F.2d 1186, 1194, 1197 (7th Cir. 1991). While initially denouncing counsel's concessions and withholding its approval of out-and-out admissions of guilt, the appellate court then independently found a consent/waiver[8] and declined to find ineffective assistance. 931 F.2d at 1195-97. It is with this reasoning that Bosko takes issue, contending that the decision below not only fuels a split in circuits as to the propriety of defense counsel conceding/stipulating a client's guilt, but breaks with settled Seventh Circuit caselaw which flatly rejects such representation.

In *Achtien v. Dowd*, 117 F.2d 989, 993 (7th Cir. 1941), the court affirmed the denial of federal habeas relief where a state inmate argued that his lawyer stipulated to facts establishing his guilt, absent his knowledge or consent. While affirmance of denial of the writ was *wholly jurisdictional*—defendant failed to exhaust state court remedies before seeking federal relief—the court nevertheless stated that to allow defense counsel the authority to change defendant's plea or to enter stipulations without his consent would constitute "a denial of several rights guaranteed the accused by the Bill of Rights". *Id.* at 994.[9]

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[8] The issue of appellate factfinding is dealt with in Argument III, *infra*.

[9] The *Achtien* decision was recently upheld in *United States ex rel. Ross v. Franzen*, 668 F.2d 933, 941 (7th Cir. 1982).

Our lead case is *Wiley v. Sowders*, 647 F.2d 642 (6th Cir. 1981), *cert. den.* 454 U.S. 1091 (1981), wherein defendant pleaded not guilty to burglary/theft/felony offender charges and proceeded to a jury trial with appointed counsel. Throughout closing arguments, defense counsel repeatedly admitted *Wiley*'s guilt to the jury, absent prior consent by the defendant. *Id.* at 644-46.

Wiley sought federal habeas corpus relief, arguing that his counsel's repeated concessions of guilt, without his consent, deprived him of effective assistance of counsel under the Sixth and Fourteenth Amendments. *Id.* at 644. While reversing the denial of habeas relief, the court noted the *balance* to be struck between a defendant's fundamental due process rights and the need of counsel to artfully structure the case. *Id.* at 648.

Yet, notwithstanding the need for professional license in advocacy, the court held that admissions of defendant's guilt without defendant's consent amounted to *ineffective* assistance of counsel. *Id.* at 650. Such argument by counsel represented everything which defendant had rejected by entering a not-guilty plea, and "constituted a surrender of the sword". *Id.* at 649-50. Ultimately, the court reversed and remanded, finding defendant's fundamental right to a qualitatively adversarial trial superior to the unfortunate fashioning of counsel's case. *Id.* at 650.[10]

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[10] *Wiley* noted, in part, that A.B.A. Canon 7-24 of Professional Responsibility prohibits expressions of personal opinion as to the guilt/innocence of an accused. Bosko would also point to A.B.A. Standard for Professional Responsibility §4-7.8, Defense Function, which precludes the expression of an attorney's personal belief on guilt or innocence, for "the moment he does so, he steps outside his role of the advocate" (*quoting* J. Singleton, *Conduct at the Bar* 41 (1933)).

Faced with similar situations, the Eleventh Circuit also placed a premium on adversarial tactics which remain true to the client's plea. In *Francis v. Spraggins*, 720 F.2d 1190, 1193 (11th Cir. 1983), *cert. den. sub nom. Kemp v. Spraggins*, 470 U.S. 1059 (1985), court-appointed counsel conceded defendant's guilt at the end of the guilt/innocence phase of trial, flying in the face not only of defendant's not guilty plea, but also of his testimony denying any participation in the charged offense whatsoever. In light of defendant's mental retardation, counsel abandoned a theory of acquittal based on insanity, and instead argued his belief of defendant's guilt and urged life imprisonment. *Id.* at 1193 n.7.

In affirming the grant of habeas relief to defendant, the court noted that the presumption of attorney competence can be rebutted where counsel's actions do not follow a pattern of "rational trial strategy". *Id.* at 1194. Where faced with a plea of not guilty, even a strong government case cannot ratify a concession of guilt. *Id.*

In *Lobosco v. Thomas*, 928 F.2d 1054 (11th Cir. 1991), the Eleventh Circuit placed great emphasis on client-consent to *legitimize* counsel's concessions of guilt. In *Lobosco*, the appellate court sanctioned counsel's concession of guilt and contrition-defense where such tactic was the product of extensive discussion with *Lobosco* and bore his own imprimatur through understanding and consent. *Id.* at 1057.

The *Lobosco* opinion quickly distinguished that case from a scenario (as in the Bosko's case) where the defendant did not fully understand and consent to such argument. *Id. Lobosco* further cautioned that better practice would be for defense counsel pursuing such tactic to make a formal record of the defendant's consent. *Id.*

As the panel opinion in the *instant* case makes clear, counsel for Bosko, during summation, conceded guilt to nine federal criminal offenses charged against him. Bosko had not pleaded guilty, there is absolutely no "on the record" admonition from the trial judge or consent/waiver by Bosko. There is no statement from defense counsel that Bosko agreed to concessions of guilt during his lawyer's summation.[11]

The idea of client-concession as a concept capable of legitimizing such argument by counsel was taken one step further in *Mullins v. Evans*, 622 F.2d 504, 506 (10th Cir. 1980), wherein defendant was convicted of first degree murder and sentenced to life imprisonment. Trial counsel chose to pursue a first degree murder conviction, rather than first degree murder with a recommendation of leniency or lesser included offenses in an effort to obtain the earliest parole release. *Id.* at 506. Neither defendant's consent nor parole-advantages, however, could save the day in *Mullins*; the court vacated finding that such ineffective assistance transformed the trial into a charade. *Id.*

Related authorities also include *Cox v. Hutto*, 589 F.2d 394, 395-96 (8th Cir. 1979) and *United States v. Brown*, 428 F.2d 1100, 1102-03 (D.C. Cir. 1970), both of which considered the effect of stipulations entered into without de-

[11] The Eleventh Circuit decision in *United States v. Joshi*, 896 F.2d 1303, 1307-08 (11th Cir. 1990) is not to the contrary. *Joshi* considered trial counsel's unilateral decision to pursue a bifurcated trial, without the client's express consent. Circuit Judge Kravitch, writing for the panel, drew a distinction between tactical decisions with constitutional implications versus decisions on "inherent personal right of fundamental importance", implying the need for express client consent in the latter case. *Id.* at 1308. This reading is in keeping with the decision in *Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983), also authored by Circuit Judge Kravitch.

fendant's blessing. In *Cox*, the effect of defense counsel's stipulation of defendant's prior convictions without inquiring as to defendant's concurrence relieved the prosecution of its burden of proof on its habitual offender charge. 589 F.2d at 395. The appellate court reversed and remanded, equating the stipulation with a guilty plea (faulty for lack of proper admonitions). *Id.* at 396.

Brown concerned counsel's stipulation of facts establishing defendant's guilt in the face of his not-guilty plea, 428 F.2d at 1102. While reversing, the court noted that such a stipulation implicates Rule 11 considerations, and that the district court should personally address the defendant before accepting a stipulation that defendant in fact committed the charged acts. *Id.*[12]

In candor, Bosko alerts this Court to various authorities to the contrary. These decisions, however, are distinguishable on their facts. In *Brown v. Dixon*, 891 F.2d 490, 498-500 (9th Cir. 1989), *cert. den. sub nom. Tyler v. Ohio*, 111 S.Ct. 371 (1990), the Ninth Circuit considered counsel's concessions of guilt during the *penalty phase* of defendant's capital murder trial. The court rejected ineffective assistance arguments, reasoning that because defendant had *already* been found guilty, he had been defrocked of the presumption of innocence and at that point there could be no prejudice from what had become a *statement of fact*. *Id.* at 499.

In *Rushing v. Butler*, 868 F.2d 800, 805 (5th Cir. 1989) defendant complained on appeal of *two isolated remarks*

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[12] *See also People v. Hattery* (1985) 109 Ill.2d 449, 488 N.E.2d 513, 519; *People v. Salgado*, 200 Ill.App.3d 550, 558 N.E.2d 271, 274 (1st Dist. 1990), which reject as ineffective tactics of conceding defendant's guilt.

during counsel's closing argument which accurately reflected defendant's own testimony that he was present at the murder scene, and that counsel would not insult the jurors' integrity by asking them to let defendant walk out of court free. The appellate court refused to find ineffective assistance, noting that there were only *two* such remarks, and that they accurately reflected defendant's testimony. *Id.* Such is readily distinguishable from the instant case, wherein defense counsel made such statements the running theme of his argument *while stacking prosecution evidence in front of Bosko.* (*See e.g.*, Tr. 5176-78, 5185, 5188, 5171, 5173, 5174, 5192, 5199).

Similarly, in *United States v. Long* (8th Cir. 1988), 857 F.2d 436, 441 (8th Cir. 1988) defendant argued ineffective assistance for a lone statement during his counsel's opening which alluded to defendant's "peripheral involvement" in the charged offenses. On appeal, the court declined to find such a statement tantamount to a concession of guilt, since one may be peripherally involved in the commission of a crime, yet escape liability for a lack of criminal intent. *Id.* at 443.

The decision in *Hughes v. Borg*, 898 F.2d 695, 703 (9th Cir. 1990) is not to the contrary. In *Hughes* defense counsel first argued *against* conviction on the murder count, then argued in the alternative that even if the jury did convict, then it should not find special circumstances. *Id.* at 703. *Hughes* is distinguishable in that counsel in fact contested the murder charge, whereas counsel for Bosko made no attempt to challenge nine of the counts against Bosko.

Settled constitutional law affords a criminal defendant the right to effective representation. The question which this Court needs to address is whether counsel's concessions and exhortations of his client's guilt before judge

and jury approach the level of representation *vel non*. Such is currently the subject of a split among the federal appellate circuits, with no definitive resolution to guide criminal trial practitioners. Plenary review is necessary to resolve this question and insure the right of effective assistance of counsel.

III.

WHETHER THE DECISION BELOW DEFIED PRECEDENT FROM THIS COURT DISALLOWING COURTS OF APPEALS FROM ENGAGING IN FACTFINDING—IN THAT THE DECISION BELOW INDEPENDENTLY FOUND STRATEGY-APPROVAL AMOUNTING TO A WAIVER OF BOSKO'S SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL, BASED ON A POST-TRIAL LETTER?

It is axiomatic that "factfinding 'is the basic responsibility of district courts, rather than appellate courts' ". *Maine v. Taylor*, 477 U.S. 131, 144 (1986). As such, this Court has consistently discouraged appellate panels from blurring judicial boundaries, opting instead to maintain the district court as the primary factfinding forum.

> The Federal Rules of Criminal Procedure contain no counterpart to Federal Rule of Civil Procedure 52(a), which expressly provides that findings of fact made by the trial judge "shall not be set aside unless clearly erroneous." But the considerations underlying Rule 52(a)—the demands of judicial efficiency, the expertise developed by trial judges, and the importance of first hand observation, *see Anderson* [*v. Bessemer City*], 470 U.S. at 574-575, 105 S.Ct. at 1512—all apply with full force in the criminal context, at least with respect to factual questions having nothing to do with guilt.

Taylor, 477 U.S. at 145.

In the same vein, this Court again denounced appellate factfinding in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986), wherein the appellate court undertook *de novo* review of the issues before the district court and made an independent review of the record while reversing the district court's findings. *Id.* at 710.

The Supreme Court found reversible error in the appellate court's action, offering a number of solutions to an inadequate trial record. *Id.* at 714. Rather than undertaking independent factfinding, an appellate court is directed to remand, reverse, or set aside a district court's findings. *Id.* The solution is *not* to *find the facts* convenient to support its ultimate conclusion:

> 'The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.'

Id. (*quoting Anderson v. Bessemer City*, 470 U.S. 564, 574-75 (1985)).[13]

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[13] Justice Stevens, in dissent, opted to affirm the judgment of the Court of Appeals, interpreting Rule 52(a) of the Federal Rules of Civil Procedure as not requiring remand for the "purely ministerial act" of entering formal findings on uncontroverted facts. *Id.* at 716. However, as the majority noted in *Maine v. Taylor*, 477 U.S. 131, 145, Rule 52(a) is grounded in considerations of judicial efficiency, first-hand observation, and trial expertise. Further, these concerns are ever-present in the *criminal context. Id.*

Finally, in *Pullman-Standard v. Swint*, 456 U.S. 273, 279-284 (1982), the appellate court concluded that the district court failed to consider certain relevant evidence in a Title VII challenge, and undertook an independent review to support its rejection of the district court's findings. On appeal to the Supreme Court, the appellate court was criticized not for identifying the district court's mistake, but rather for taking an active independent consideration of the totality of circumstances in the record. *Id.* at 291.

> '*[F]actfinding is the basic responsibility of district courts*, rather than appellate courts, and . . . *the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.*' (footnote omitted)

Id. at 291-92 (*quoting DeMarco v. United States*, 415 U.S. 449, 450 n. (1974)) (emphasis added).[14] *See also*, *United States v. Rodriguez*, 888 F.2d 519, 525 (7th Cir. 1989) (noting that "appellate judges do not find fact", in a criminal setting); *Mars Steel Corp. v. Continental Bank, N.A.*, 880 F.2d 928, 933-34 (7th Cir. 1989); *Strauch v. Gates Rubber*, 879 F.2d 1282, 1285 (5th Cir. 1989) (appellate court is in "no position" to weigh evidence or inferences—that is solely the function of the fact finder).

At bar, the appellate court made much of a rambling, handwritten letter submitted by (and purportedly written by) Bosko to the district court, post-trial (R. 601). *United States v. Simone*, 931 F.2d 1186, 1196-97 and n.13 (7th Cir. 1991). Such letter was mentioned by appellate

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[14] *See also* footnote 22 of the *Pullman-Standard* decision, which provides additional relevant citations, including 5A J. Moore & J. Lucas, Moore's Federal Practice §52.06(2) (1982). 456 U.S. at 292 n.22.

counsel for Bosko in his opening briefs in the appellate court (App't. Br. at p. 22, n.19).

In the context of Bosko's appellate ineffective-assistance argument (based on trial counsel's concessions of guilt), the letter was referred to so as to *juxtapose Bosko's wishes* versus the *counsel he received.* In particular, the letter alerted the appellate court to Bosko's pretrial inclination to tell the truth and testify on his own behalf, but that trial counsel dissuaded Bosko from doing so. (App't. Br. at p. 22, n.29). Additionally the letter represented that, upon a government-sponsored plea agreement, Bosko's trial lawyer counselled against it, maintaining that Bosko should receive *less* than the 9 years which was offered. (App't. Br. at p. 22, n.29).

The government, however, *never mentioned* the letter in support of its argument against a finding of ineffective assistance of counsel, or in connection with a waiver [of effective assistance] of any kind. (A'ee. Br. pp. 32-39). Yet, in its decision holding that trial counsel's representation was *not* ineffective, the appellate court first expressed its disapproval of such admissions, but then fixed on the notion of client-concession as a vehicle toward legitimizing such argument by counsel. *Simone*, 931 F.2d at 1196.

After setting out some of the content of the letter (including Bosko's interpretation of the facts and events), *the court then impermissibly found*:

> In light of Bosko's letter, therefore, we find it reasonable to believe that trial counsel's actions were "based, quite properly, on informal strategic choices made by the defendant and on information supplied by the defendant (citation omitted). Instead of "pleading his client guilty", as Bosko herein maintains, this

> defendant's trial lawyer was following his client's wishes, 931 F.2d at 1196.
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> * * * *
>
> It was a reasonable plan that was evident from the beginning of the trial. At no time did the defendant object to it; in fact, *we believe he chose or at least condoned the tactics. Our position was reinforced by Bosko's post-trial letter to the sentencing judge which provided ample evidence of his approval of the strategy*, 931 F.2d at 1197 (emphasis added).

In candor, Bosko notes the decision in *Bonilla-Romero v. United States*, 933 F.2d 86, 89 (1st Cir. 1991), wherein defense counsel alerted the district court, pretrial, to their particular and established trial strategy as the basis for a stipulation as to government witness testimony. In addition, defendant's waiver of a jury trial was accompanied by adequate safeguards. *Id.* at 89. Post-conviction, §2255 proceedings led to a remand on the voluntariness of the stipulation; defendant testified in the district court that his stipulation was part of his chosen trial strategy. *Id.* at 87. Defendant then appealed the district court's finding of a voluntary stipulation. *Id.*

While affirming the finding of voluntariness, the appellate court took into consideration defendant's remand-testimony, although it did note that "we should not ordinarily rely upon ex post facto statements" in making such determinations. *Id.* at 89. A distinguishing factor remains, however. After the pretrial colloquy took place, the First circuit decided an opinion providing appropriate reasoning for the stipulation issue, and to which defendant's remand-testimony was relevant. *Id.* Thus, a reading of *Bonilla-Romero* does not automatically condone the appellate court's actions in the instant case.

Again, Bosko respectfully asks this Court to note that the government made no reference to any waiver/concession by virtue of this post-trial letter in their answering brief. (A'ee. Br. pp. 32-39). At this juncture, Bosko points to *Steagald v. United States*, 451 U.S. 204, 208-209 (1981) as dispositive authority for the proposition that where the government fails to pursue a factual issue below, it is prevented from doing so *before this Court.*

> The government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the court below, when it has acquiesced in contrary findings by those courts, *or when it has failed to raise such questions in a timely fashion during the litigation.*

451 U.S. at 209 (emphasis added).

In *Steagald*, the issue before the Supreme Court revolved around the propriety of a warrantless search for the subject of an outstanding arrest warrant, 451 U.S. at 205. The government asserted petitioner's lack of any reasonable expectation of privacy in its Supreme Court argument, yet it had taken a different tack below. Indeed, in its brief in opposition to certiorari, the government argued that the residence searched was in fact occupied by petitioner and was petitioner's residence. *Id.* at 208-209. As such, the Court rejected the government's proposed argument. *Id.* at 210-211.

As in *Steagald*, the government in the case at bar should not be allowed to argue in opposition to the granting of certiorari based on letter-waiver/concession, where it has not been heard to utter this argument at any time thus far. Rather, such argument is purely a product of appellate factfinding which effectively overstepped permissible judicial boundaries.

Specifically, the appellate court gleaned what amounted to a *hind-sight waiver* while using Bosko's letter to support its finding of effective assistance of counsel. That court effectively turned its decision on something which was never argued by the government. Since neither the issue of waiver of the right to plead not guilty nor the waiver of effective assistance of counsel was broached before the district court, the appellate court clearly erred in finding waiver/concession based on the letter.

CONCLUSION

Because of the fundamental Constitutional questions raised, as well as the apparent split in circuits, this Court is requested to issue a writ of certiorari to review petitioner's conviction.

Respectfully submitted,

ALLAN A. ACKERMAN
Counsel of Record
JOELLE H. HOLLANDER
2000 North Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorneys for Petitioner
ROBERT "BOSKO" STRUMINIKOVSKI

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GROUP APP. A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 88-3412, 88-3479, 88-3480, 88-3513, 88 3514, 88-3515, 88-3522 and 89-1094

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DOMINIC SIMONE, ROBERT "BOSKO" STRUMINIKOVSKI, NICHOLAS SIMONE, JOHN PETER SUCHAN, VASIL STRUMINIKOVSKI, PANAGIOTIS "PETE" PISTAS, DEBORAH CERVENY and LUBIN MILEVSKI,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 CR 669—**Ilana D. Rovner**, *Judge.*

ARGUED SEPTEMBER 14, 1990—DECIDED MAY 3, 1991

Before CUMMINGS and MANION, *Circuit Judges* and GRANT, *Senior District Judge.**

GRANT, *Senior District Judge.* Before the court are the consolidated appeals of eight defendants convicted of numerous conspiracy and drug trafficking offenses pursuant

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

to 21 U.S.C. §§ 848, 846, 841(a)(1), 845b(f), and 844, and 18 U.S.C. §§ 201(b)(1), 924(c), and 922(g)(1). All the defendants challenge the conspiracy count of the indictment and two jury instructions. Defendants Bosko and Vasil Struminikovski also allege ineffective assistance of counsel and prejudicial error in the jury instructions during the forfeiture phase of the trial. In addition, defendant Deborah Cerveny challenges the sufficiency of the evidence concerning her participation in the conspiracy. For the following reasons, we affirm the convictions.

BACKGROUND

Under the eighteen-count superseding indictment[1], defendant Robert "Bosko" Struminikovski [Bosko] was individually charged with engaging in a continuing criminal enterprise; conspiracy; providing cocaine to a pregnant individual; offering a bribe to a public official; possession of morphine; possession of firearms by a convicted felon; and possession of firearms during and in relation to his commission of drug trafficking offenses. All the defendants were charged with conspiracy to distribute and to possess with intent to distribute cocaine and heroin, and various defendants were charged in separate counts of actual distribution and possession. The indictment additionally included the charge that certain assets belonging to Bosko, his father Vasil Struminikovski [Vasil], and Amanda Roland

[1] The original grand jury indictment was returned against Robert "Bosko" Struminikovski, John Peter Suchan, and Amanda Roland on September 24, 1987. A superseding indictment was brought on January 14, 1988, adding ten defendants and numerous charges. On April 28, 1988, the grand jury returned a second superseding indictment, the one actually tried in the district court, charging twelve defendants in eighteen counts with various federal drug-related offenses from approximately 1985 through August 29, 1987. Four of those charged, Carmella Viola, Brenda Parson, Amanda Roland, and Vito Cancialosi, entered guilty pleas prior to trial and testified at trial on behalf of the government. Defendant Deborah Cerveny pled guilty to two substantive counts of the indictment but chose to stand trial on the conspiracy count.

[Roland] were subject to forfeiture to the United States pursuant to 21 U.S.C. § 853(a).

On August 1, 1988, the jury trial commenced before United States District Judge Ilana D. Rovner. Following an eight-week trial, the jury returned guilty verdicts on all charges against all defendants.[2] It also returned forfeiture verdicts against Vasil and Bosko Struminikovski.

FACTS

Even though Bosko's appellate counsel took editorial liberties by glamorizing his client as a "Yugoslavian farm boy . . . living the American dream," he accurately described Bosko as a salesman (of drugs) who worked hard to sell his wares (cocaine, primarily) at all hours of the day and night, "out of his car, out of his pockets, out of his home, out of some dozen restaurants and fast food joints."[3] But the facts are not glamorous; with the other defendants Bosko established a narcotics sales network of the type that this court has seen too often.

The indictment charged that there was a drug distribution conspiracy, under Bosko's direction, in and around Cicero, Illinois, from 1985 through August 29, 1987. However, the evidence introduced at trial established that the conspiracy began in the summer of 1984, when Bosko and Roland, his girlfriend, met two of Bosko's acquaintances in Florida. Three weeks later Roland flew to Florida and

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[2] The following sentences were accorded to each defendant: Bosko, 23 years imprisonment, $140,000 in fines, and 38 years of supervised release; Nicholas Simone, 4 years imprisonment; Dominic Simone, 4 years imprisonment; John Peter Suchan, 6½ years imprisonment and 7 years supervised release; Vasil Struminikovski, 5 years imprisonment plus a $10,000 fine; Panagiotis Pistas, 30 months imprisonment; Deborah Cerveny, 4 years imprisonment and 3 years supervised release; and Lubin Milevski, 8 years imprisonment. The sentences have not been challenged on appeal.

[3] Consolidated Supplemental Brief for Bosko and Vasil Struminikovski at 7.

then drove back to Chicago; in the car was a kilogram of cocaine.

During the fall of 1984, Bosko began selling cocaine in the United Grill, a restaurant in Cicero. He sat at a back table and took drugs from the ceiling tiles when he made a sale. Defendant Lubin Milevski [Milevski] obtained cocaine from Bosko and sold it at the same restaurant in 1985. Soon Carmella Viola [Viola], Vito Cancialosi [Cancialosi], and defendants Panagiotis Pistas [Pistas] and Deborah Cerveny [Cerveny] were assisting Bosko and Milevski with the drug sales, usually selling ¼-gram packets of cocaine and splitting the proceeds with Milevski or Bosko. Milevski and others sold cocaine during the day, and Bosko sold it in the evening.

On the evening of October 3, 1985, Cerveny sold 3.7 grams of cocaine to undercover policeman Jeffrey Caudill [Caudill]. She told him that the cocaine would be delivered by someone driving a white Buick Riviera, and that she could get more for Caudill in the future. Shortly afterward Bosko drove up in a white Riviera and went into the United Grill. Five minutes later Cerveny emerged from the restaurant, delivered the cocaine to Caudill in exchange for $275, and re-entered the United Grill with the money.

In February 1986, Milevski opened La Petite Snack Shop in Cicero, near the United Grill, and the drug operation moved there. Again Milevski supervised the daytime cocaine sales and Bosko took charge at night. Viola, Pistas, Cancialosi, Brenda Parson [Parson], and defendants Nicholas Simone [Nick], Dominic Simone [Dominic], and John Suchan [Suchan] assisted Bosko and Milevski with the distribution of cocaine at La Petite from January 1986 to June 1986, when the restaurant closed. For security the conspirators installed surveillance cameras, monitor screens in the back room, a steel door with a peephole at the entrance to the back room, and a window in the wall through which the drugs were passed. Milevski hired Parson to work behind the counter and Pistas to cook.

In fact, they watched for police and sold drugs; records showed that very little food was sold at La Petite.

But drug sales went well. Drugs were distributed from the back room of La Petite. Bosko packaged the cocaine and handed it through the window to Dominic, Nick or another of the co-conspirators for delivery. When Bosko was not present at La Petite, he left another co-conspirator in charge. At those times, Bosko would sell his drugs elsewhere. Throughout this period and after La Petite closed, Bosko and Vasil distributed cocaine from Vasil's two houses in Cicero. Bosko also kept and sold cocaine in his home in Brookfield between April 1986 and April 1987.

When La Petite closed, Milevski continued to obtain cocaine from Bosko and to sell it through Viola and Parson from outside the United Grill. Bosko moved his drug sales to other nearby restaurants; Cerveny was often present with Bosko and the others. Nick and Dominic frequently returned phone calls received on Bosko's pager, took cocaine orders from customers, accepted merchandise in exchange for cocaine, and occasionally delivered cocaine to customers. Suchan also helped Bosko distribute cocaine during this period by cutting, packaging and occasionally delivering cocaine to Bosko's customers. In the summer of 1986, Bosko began selling drugs from Suchan's house as well.

In March and April of 1986, DEA Agent Tom Kelly [Kelly], posing as an attorney eager to buy drugs, purchased cocaine on two occasions from Bosko. In March 1987, Kelly purchased 55 grams of Bosko's cocaine from Suchan. In July and August of 1987, Bosko and Suchan began negotiating with the agent for the sale of approximately 2.3 kilograms of Bosko's cocaine. Kelly's meeting with Suchan was videotaped by the DEA. On August 28, 1987, the deal was completed, and Roland, who was 8½ months pregnant at the time, delivered the cocaine to Kelly. After Kelly paid her, Roland was taken into custody. Suchan and Bosko were arrested later that night. As he

was placed under arrest, Bosko attempted to bribe the arresting officers. Agents recovered a significant amount of cash and cocaine from Bosko's shirt pocket and truck, and more cocaine, heroine and morphine, as well as guns and cash from his house.

Much more detailed evidence, both direct and circumstantial, was presented by the government to show each defendant's relationship to Bosko and to each other, and each one's participation in the conspiracy. The government also offered evidence that Dominic and Cerveny warned Viola and Parson not to talk to the government before trial. But Viola, Parson, Roland and Cancialosi entered guilty pleas and agreed to testify at trial on behalf of the government.

ANALYSIS

I. Single or multiple conspiracy charge in indictment

Defendants contend that the district court should have dismissed Count 2 of the indictment, the conspiracy count, because it charged multiple conspiracies in a single count, in violation of Fed. R. Crim. P. 8.[4]

Count 2 charged that, from 1985 through August 29, 1987, twelve named defendants conspired to distribute and to possess with intent to distribute cocaine and heroine in violation of 21 U.S.C. § 841(a)(1). It presented the dif-

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[4] Although defendants' claim of improper joinder of separate offenses recites the language of Fed. R. Crim P. 8(a), defendants cannot rely on 8(a), for that rule may be applied only to offenses joined against a single defendant. 8 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 8.06[1] (2d Ed.1990). "When two or more defendants are involved in a joint indictment, our analysis of the joinder question proceeds under Fed. R. Crim. P. 8(b)." *United States v. Diaz*, 876 F.2d 1344, 1355 (7th Cir. 1989). Rule 8(b) provides that "two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."

ferent locations of the conspiracy's drug transactions, specific drug sales to undercover agents from those locations, and various telephone calls that facilitated the cocaine sales by Bosko and Roland to Agent Kelly. In addition, Count 2 identified the drugs and firearms found on Bosko and in his car and house, and charged that he attempted to bribe the arresting officers. All the acts described in Count 2 were alleged to further a single drug conspiracy.

On appeal defendants claim that Count 2 encompassed two or three separate conspiracies. They contend that, during 1985 and 1986, core participants Bosko and Milevski began the conspiracy and supplied relatively small amounts of cocaine to others to sell, or sold it themselves, in two area restaurants and from Bosko's and Vasil's houses. The defendants then contend that in 1987 the second conspiracy began: that Bosko started working with Suchan and Roland, that former conspirators dropped out, and that larger quantities of cocaine were sold. A third arrangement, suggest the defendants, was "an itinerant selling scheme" between Bosko and the Simone brothers to distribute cocaine at various restaurants during 1987. Defendants allege that the charging of several conspiracies in one count was an error that warrants reversal.

We begin by considering the propriety of appellate review. In this case, the challenge to the indictment was not raised prior to trial as required by Rule 12(b)(2) of the Federal Rules of Criminal Procedure.[5] The failure to object to alleged defects in the indictment before trial constitutes a waiver. Fed. R. Crim. P. 12(f); *United States v. Podell*, 869 F.2d 328, 331 (7th Cir. 1989). An appellate court addresses a waived claim only if cause is shown that might justify the granting of relief from the waiver. Fed.

[5] The court's denial of pretrial motions to dismiss Count 2 for vagueness, raised by defendants Nicholas Simone, Dominic Simone, Vasil Struminikovski and Lubin Milevski, has not been appealed. No defendant moved to dismiss Count 2 before trial on the ground that it improperly joined multiple offenses in a single count.

R. Crim. P. 12(f); *United States v. Petitjean*, 883 F.2d 1341, 1344 (7th Cir. 1989); *United States v. Whaley*, 830 F.2d 1469, 1475 (7th Cir. 1987), *cert. denied*, 486 U.S. 1009 (1988). If there is sufficient cause, the court evaluates the claim under the difficult standard of the plain error doctrine. Fed. R. Crim. P. 52(b); *United States v. Balzano*, 916 F.2d 1273, 1280 (7th Cir. 1990). "A 'plain error' is one that results in 'an actual miscarriage of justice,' which implies that the defendant 'probably would have been acquitted but for the erroneously admitted evidence.' " *United States v. Mejia*, 909 F.2d 242, 247 (7th Cir. 1990). *See Balzano*, 916 F.2d at 1280.

Defendants have not given the court any cause to justify relief from the waiver. Consequently we hold that defendants' challenge to the indictment is waived.[6]

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[6] Even if we were to address the waived claim, however, we would find defendants' argument completely without merit. They assert that the conspiracy count, by alleging separate conspiracies, failed to inform the defendants of the specific charge against them, to their prejudice. Our review of the indictment reveals, however, that it stated the elements of a conspiracy offense, informed the defendants of the nature of the charge so that they could prepare a defense, and enabled them to plead the judgment as a bar to any later prosecution for the same offense. *See United States v. Moya-Gomez*, 860 F.2d 706, 751 (7th Cir. 1988), *cert. denied sub nom. Estevez v. United States*, 109 S. Ct. 3221 (1989), citing *Hamling v. United States*, 418 U.S. 87, 117, 94 S. Ct. 2887, 2907, 41 L.Ed.2d 590 (1974). Count 2 described a single ongoing drug distribution conspiracy under Bosko's direction, involving core members who bought from and sold to various suppliers and dealers who changed over time. This circuit has treated such schemes as single conspiracies rather than a series of smaller separate conspiracies. *United States v. Paiz*, 905 F.2d 1014, 1020 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1319 (1991); *United States v. Sophie*, 900 F.2d 1064, 1081 (7th Cir.), *cert. denied sub nom. Duque v. United States*, 111 S. Ct. 124 (1990). The face of the indictment properly alleged a single scheme carried out by a series of acts, *see* Fed. R. Crim. P. 8(b); *Diaz*, 876 F.2d at 1356, and clearly informed the defendants of the nature of the charges against them.

II. Instruction on "mere presence" and "mere association"

The defendants assert that the district court erred by including the last sentence in this instruction concerning a defendant's mere presence and mere association with conspirators:

> Mere presence at the scene of the crime and knowledge that a crime is being committed are not sufficient to establish a defendant's guilt. Mere association with conspirators or those involved in a criminal enterprise is insufficient to prove a defendant's participation or membership in a conspiracy. However, presence or a single act is sufficient if the circumstances permit the inference that the presence or the act was intended to advance the ends of the conspiracy.

The first statement of the instruction follows the language of Instruction 3.04 of the Federal Criminal Jury Instructions for the Seventh Circuit. The second sentence, tendered by the defense, is being considered as a potential supplement to the pattern instruction. *See* Committee Comment to Pattern Instruction 3.04. However, the defendants challenge the third sentence on two bases: that it is not included in the pattern instruction, and that it diluted the key principle that a defendant must knowingly and intentionally join the conspiracy and agree to associate himself with its criminal objectives.[7]

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[7] At oral argument defendant Pistas individually asserted that the instruction allowed the jury to find him guilty by his mere presence when he was just "hanging around" the conspirators. The court notes that, despite numerous extensions of time, Pistas failed to file a supplemental brief; however, by permission of the court Pistas' counsel was heard at oral argument. *See* Fed. R. App. P. 31(c). We find Pistas' allegations to be without merit. There was certainly sufficient evidence at trial for a jury reasonably to conclude that Pistas was selling cocaine and facilitating the sale and delivery of drugs by others. *See, e.g., United States v. Camargo*, 908 F.2d 179, 184 (7th Cir. 1990). It was the evidence, not the instruction, that led the jury to convict Pistas of conspiracy.

On appeal, jury instructions are to be reviewed in their entirety and taken as a whole. *United States v. McNeese*, 901 F.2d 585, 607 (7th Cir. 1990). As long as they "treat the issues fairly and adequately, they will not be interfered with on appeal." *United States v. Fournier*, 861 F.2d 148, 150 (7th Cir. 1988).

This mere association/mere presence instruction has been approved by our circuit in *United States v. Caliendo*, 910 F.2d 429, 438 (7th Cir. 1990), quoting *United States v. Herrero*, 893 F.2d 1512, 1532 (7th Cir.), *cert. denied*, 110 S. Ct. 2623 (1990), quoting in turn *United States v. Xheka*, 704 F.2d 974, 988-89 (7th Cir.), *cert. denied*, 464 U.S. 993 (1983). We have found the final sentence of the instruction to be an accurate statement of the law. *United States v. Binkley*, 903 F.2d 1130, 1134 (7th Cir. 1990). In addition, this instruction is complemented by the other instructions on conspiracy which required the government to prove beyond a reasonable doubt each defendant's intent to join the conspiracy, his awareness of its common purpose and his willing participation. Therefore, the instructions given by the court, taken as a whole, make it abundantly clear that a defendant may not be convicted without knowingly becoming a member of the conspiracy.

III. **Instruction on buyer/seller principle**

Defendants object to the instruction given to the jury concerning the impact of a mere buyer/seller relationship on a defendant's membership in the conspiracy. The instruction given was as follows:

> Mere proof of a buyer/seller relationship between an individual and a member of a drug conspiracy is insufficient to convict a defendant on a charge of conspiracy. In other words, if you believe that an individual defendant was merely a willing purchaser of drugs *for his or her own personal consumption* and nothing more, that is insufficient evidence to prove his or her membership in the conspiracy. It is the defendants John Suchan and Deborah Cer-

veny's theory of defense that they were merely purchasers of drugs.

On the other hand, if a person purchased drugs from a conspirator for the purpose of reselling the drugs, he or she is a member of the conspiracy if he or she knows the general aims of the conspiracy.

The defendants submitted the first paragraph, and the government modified the instruction by adding the italicized portions. The court gave the combined instruction. Defendants focus on the second paragraph, which they claim is contrary to law and misleading because it improperly suggests that membership in a conspiracy could be established without proof of intent to join the conspiracy.

We recently approved an instruction quite similar to this one in *United States v. Briscoe*, 896 F.2d 1476, 1514 (7th Cir.), *cert. denied sub nom. Usman v. United States*, 111 S. Ct. 173 (1990). As in *Briscoe*, the defendants' instruction herein was included, almost *verbatim*, within the instruction ultimately submitted to the jury. Furthermore, the added portions of the instruction incorporated language taken directly from prior decisions of this court on the buyer/seller issue. The instruction ultimately given to the jury in this case distinguishes clearly between a drug purchase for personal consumption and one for resale, and limits the "mere" buyer/seller relationship to the former situation. Because the instruction accurately and completely stated the buyer/seller principle in conspiracy law, we hold that it was properly given.

IV. **Ineffective assistance of counsel**

Appellate counsel for defendant Bosko Struminikovski asserts that Bosko was deprived of effective assistance of counsel when his trial attorney, Steven B. Muslin, "pleaded his client guilty" to many of the counts charged against him.

Before trial Bosko had entered a "not guilty" plea to all charges. Nothing in the record indicated that Bosko

agreed to change his plea. Yet, after the eight-week trial, in his summation, Bosko's trial counsel repeatedly stated that his client sold dope. At one point Mr. Muslin placed before the jury an exhibit of cocaine and stated, "The truth of the matter is, my client sold cocaine. And on March the 12th, 1986, he did sell this cocaine to [undercover agent] Tom Kelly." Tr. at 5173. In fact, the trial transcript reported some twenty statements made by his trial counsel conceding that Bosko packaged and sold cocaine and kept in his possession firearms, beepers, packaging materials and several types of narcotics.

According to Bosko, in the record there is neither objection nor consent to his attorney's stipulation of Bosko's guilt to certain counts. Bosko argues that a silent record will not support a waiver of a guilty plea. *Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 1712, 23 L. Ed.2d 274 (1969). He further asserts that Mr. Muslin's conduct must be adjudged constitutionally ineffective because he admitted Bosko's guilt with respect to many acts, and closed his summation by urging the jury: "Please find my client guilty of those things that he should be found guilty of. Find him not guilty of those things that he should not be found guilty of." Tr. at 5217. He urges this court to adopt the Sixth Circuit position that "an attorney may not admit his client's guilt which is contrary to his client's earlier entered plea of 'not guilty' unless the defendant unequivocally understands the consequences of the admission." *Wiley v. Sowders*, 647 F.2d 642, 649 (6th Cir.), *cert. denied*, 454 U.S. 1091 (1981) (citation omitted). Bosko points out that this circuit, in dictum, offered a similar proposition: "Accused's counsel had no authority to change his plea nor to stipulate facts without his consent." *Achtien v. Dowd*, 117 F.2d 989, 994 (7th Cir. 1941).

The government responds that, from his opening argument, Bosko's trial counsel followed a deliberate trial strategy of admitting Bosko was a drug dealer. The evidence against Bosko was overwhelming; therefore, according to the prosecutor, Mr. Muslin's tactic was to portray

Bosko as a "penny-ante dope peddler" on his own, not a leader of a conspiracy or of a continuing criminal enterprise. The government explained Muslin's strategic plan: By admitting what could not be denied, Bosko's attorney hoped to buttress his credibility with the jury. Therefore during closing argument Muslin conceded those counts without mandatory minimum sentences and contested the counts with the enhanced, consecutive or mandatory minimum penalties. In this way, if the approach had worked, Bosko would have been found guilty only on those counts for which he could argue the most lenient sentence.

Bosko's claim of ineffective assistance of counsel was not raised below or on collateral attack. However, because the record is sufficiently developed for a review of the issue (*see United States v. Madewell*, 917 F.2d 301, 303 n.1 (7th Cir. 1990); *United States v. Ray*, 828 F.2d 399, 420 (7th Cir. 1987), *cert. denied*, 485 U.S. 964 (1988)), we will consider whether the defendant carried his burden of proving constitutionally ineffective legal assistance under the two components of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant is first required to show that his counsel's conduct was deficient by identifying "acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066. The defendant must further establish that his counsel's professionally unreasonable conduct prejudiced his defense by demonstrating a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. The *Strickland* court points out the strong presumption that counsel rendered adequate assistance and acted in accord with sound trial strategy, *id.* at 689, 104 S. Ct. at 2065, a presumption the defendant must overcome. *See Balzano*, 916 F.2d at 1292.

Defendant Bosko's charges of constitutionally deficient conduct focus entirely on his counsel's summation after the eight-week trial. During his closing argument Mr. Muslin made these statements:

> I told you from the beginning that my client sold dope and that he sold it by himself.
>
> . . . [T]hat is the subject of Count Seven.[8] And you can find him guilty of that because it happened, and Tom Kelly [undercover agent] said so and I believe Tom Kelly.
>
> This cocaine is the subject of Count Eight.[9] I am not quarrelling with it. And Bosko himself sold it to Tom Kelly at the McDonald's. . . . If you want to find him guilty on Count Eight, please be my guest. That is something he is guilty of. Like I said when I started, only find him guilty of what he is guilty of.
>
> . . . So these are Bosko's beepers. Bosko sold dope. They didn't find beepers on any of these other people. Do you see beepers on anybody else? No, they came from Bosko. . . . It proves that he sold dope.
>
> I know this. My client sold cocaine out of his pockets every single night just about at five restaurants, stayed up all night long, driving around, then came home, slept, got up, packaged the cocaine, counted the money and went out again.

See Tr. at 5162-5217. Mr. Muslin also admitted that Bosko owned packaging tools, guns, cocaine, heroine and morphine. He frequently reiterated that Bosko packaged and sold cocaine himself, and held up the drugs that had been found, at the time of arrest, in Bosko's pockets, truck and house.

These concessions by Bosko's counsel were bold and blatant. However, our examination of the trial transcript reveals that the admitted facts arose from indisputable evidence and credible testimony. And the concessions made

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[8] Count Seven of the indictment charges that Bosko distributed of 45.42 grams of cocaine on March 12, 1986.

[9] Count Eight of the indictment charges that Bosko distributed 56.4 grams of cocaine on April 29, 1986.

by Mr. Muslin about the defendant's activities concerned the drug trafficking that Bosko did only on his own or with Amanda Roland, his girlfriend, who entered a guilty plea. The attorney vigorously contested the most serious charges, such as conspiracy and continuing enterprise. We find this approach to be a logical trial strategy.

Two tactics were obvious upon review of the trial transcript. First, defense counsel's appeal that the jury "find my client guilty of things that he did, and not . . . find him guilty of things that he didn't do and that the government hasn't proven" (Tr. at 5167) was a deliberate strategy woven throughout the trial. His opening address to the jury suggested that the evidence would show no continuing criminal enterprise, but rather some information about Bosko that the police embellished until they turned "a molehill into a mountain." Counsel then urged the jury:

> And you people have to stop that molehill from becoming a mountain. . . . If someone did something wrong they should be found guilty of what they did, not of what the government would like you to think they did.

Tr. at 79.[10] His closing contained the same argument.

Second, after such overwhelming evidence of drug trafficking was introduced at trial, defense counsel intended to portray Bosko as a "dope dealer" selling on his own, without assistance from others. Perhaps this tactic included an altruistic purpose of protecting Bosko's co-defendants (particularly his father) from a conspiracy charge; but

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[10] Indeed, throughout the trial counsel insisted that Bosko was not guilty of Counts 1 (continuing criminal enterprise); 2 (conspiracy); 3 (delivery, with Cerveny, of 3.7 grams of cocaine to an undercover agent); 5 (delivery, with Cancialosi, of 2.7 grams of cocaine); 6 (delivery of 3.2 grams of cocaine); 10 (providing cocaine to a pregnant individual, an offense with an enhanced penalty); 13 (bribery of a public official); and 17 (possession of firearms in connection with a drug trafficking crime, with a mandatory minimum five-year consecutive sentence). *See* Tr. at 78-82, 5181-5214.

more likely Mr. Muslin hoped to avoid a guilty verdict for Bosko on the charge with the most severe penalty, continuing criminal enterprise, which carried a ten-year mandatory minimum sentence.

We next consider Bosko's assertion that nothing in the record indicates Bosko's consent to a plan conceding his guilt on some counts. The *Strickland* Court suggested that, in assessing counsel's litigation decisions, "an inquiry into counsel's conversations with the defendant might be critical." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066. In this case, even though we know nothing of the discussions between Bosko and his attorney, we have in the record a 22-page handwritten letter sent post-trial by Bosko to the trial judge. Bosko's appellate counsel referred the court to one page of the letter,[11] in which Bosko stated that his lawyer discouraged him from testifying or considering a guilty plea.[12] In the rest of the letter, however, Bosko reported his interpretation of the circumstances, events and people at issue in the trial. The letter reported that Bosko's father was hard-working and honest, that the co-defendants never worked for Bosko, and that Bosko and his girlfriend Roland sold drugs without the help of anyone else. These rambling explanations made clear the fact that attorney Muslin's trial tactics followed Bosko's approach by denying the conspiracy while conceding Bosko's own undeniable drug transactions.[13] In light of Bosko's

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[11] *See* Bosko's Supplemental Brief at 22 n.29. Bosko's letter is found in the record at docket number 601.

[12] The defendant has not claimed herein that his attorney prevented him from pleading guilty or from giving information to the government or to the court.

[13] Indeed, the letter reveals that Bosko would have conceded far more than his attorney thought prudent, in light of his plea of not guilty. He wanted to explain his activities to the government: "If they would have tried to approach me from the beginning, I was here for them. I don't have anything to hide (Like I told them when I was arrested) that, in a way I was glad to be arrested because my behavior was like a disease; for some reason, I could not stop."

letter, therefore, we find it reasonable to believe that trial counsel's actions were "based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Id.* Instead of "pleading his client guilty," as Bosko herein maintains, this defendant's trial lawyer was following his client's wishes.

A defendant is "deprived of effective assistance of counsel when his own lawyer admit[s] his client's guilt without first obtaining his client's consent to this strategy." *Wiley v. Sowders*, 647 F.2d at 650.

> [C]ounsel's *complete concession* of the defendant's guilt nullifies his right to have the issue of his guilt or innocence presented to the jury as an adversarial issue and therefore constitutes ineffective assistance.

Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983), *cert. denied sub nom. Kemp v. Spraggins*, 470 U.S. 1059 (1985) (emphasis added), citing *Wiley*. But when the admissions concern only some of the charges to be proven[14], or when they do not actually concede guilt[15], counsel's concessions have been treated as tactical retreats and deemed to be effective assistance.

In its discussion concerning the right to effective assistance of counsel as a right to "meaningful adversarial testing," the Supreme Court presents a fine-line distinction concerning the duty of defense counsel representing an accused who offers little or no defense:

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[14] *See, e.g., Jones v. Butler*, 864 F.2d 348, 365-66 (5th Cir. 1988), *cert. denied*, 490 U.S. 1075 (1989) (counsel's concession of the death and rape of the victim but not of the identity issue was an appropriate strategic decision); *United States v. Leifried*, 732 F.2d 388, 390 (4th Cir. 1984) (selective admissions of guilt to avoid charge of continuing criminal enterprise was acceptable trial strategy).

[15] *See, e.g., Messer v. Kemp*, 760 F.2d 1080, 1088-92 (11th Cir. 1985), *cert. denied*, 474 U.S. 1088 (1986) (weakly implied guilt, unavoidable in light of overwhelming evidence, was trial strategy).

> Of course, the Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. *See Nickols v. Gagnon*, 454 F.2d 467, 472 (CA7 1971), *cert. denied*, 408 U.S. 925, 92 S. Ct. 2504, 33 L.Ed.2d 336 (1972). At the same time, even when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt. . . .

United States v. Cronic, 466 U.S. 648, 656 n.19, 104 S. Ct. 2039, 2045 n.19, 80 L.Ed.2d 657 (1984). Applying that guidance to this case, we recognize that it would have been foolhardy for Bosko's counsel to deny the drug sales so credibly proven by the government. But, rather than concede guilt completely, Mr. Muslin competently challenged the prosecution's proof of the other charges.

We do not approve of a defense counsel's deliberate, explicit admission that a jury should find his client guilty of a charge in the absence of any suggestion that the defendant concurred in the decision to proceed in such a manner. However, in the case before us, Bosko's attorney intentionally stipulated facts and conceded those charges for which there was unrefutable evidence and no mandatory sentences, but forcefully argued Bosko's innocence on the charges with heavier penalties, as part of a trial strategy. It was a reasonable plan that was evident from the beginning of the trial. At no time did the defendant object to it; in fact, we believe he chose or at least condoned the tactics. Our position was reinforced by Bosko's post-trial letter to the sentencing judge which provided ample evidence of his approval of the strategy.

As part of its highly deferential scrutiny, an appellate court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. It was incumbent on the defendant to "overcome

the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.*, citing *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L.Ed. 83 (1955). Bosko did not do so. We hold that the defendant Bosko failed to show that the conduct of his trial counsel, in following this reasonably sound strategy, did not fall below an objective standard of reasonableness.[16] Consequently, we will not overturn Bosko's conviction on the basis of his sixth amendment challenge.

V. Forfeiture

Defendants Bosko and Vasil Struminikovski argue that the district court erred during the forfeiture phase of the trial by presenting in its instruction to the jury two burdens of proof with respect to the forfeiture allegations in the indictment, both "preponderance of the evidence" and "beyond a reasonable doubt." They contend that the jury should have been instructed to find that property was forfeitable only if the government had proven it subject to confiscation beyond a reasonable doubt.

The court first reminded the jury that its previous determination of the guilt of Bosko and Vasil was final and conclusive, and that its duty now was to decide whether the defendants must forfeit certain property. The court then began the forfeiture instructions:

> You are instructed that as to each claim of forfeiture, the Government must establish *beyond a reasonable doubt* that:
>
> 1. The property constituted or was derived from the proceeds obtained, directly or indirectly, as a

[16] Since the performance prong of the *Strickland* standard of ineffective assistance was not met, we need not address the prejudice prong. However, we note that Bosko did not argue that the jury's decision would probably have been different absent his counsel's alleged errors in his closing argument.

result of a violation of Title 21 United States Code Sections 841(a)(1), 845b(f), 846 or 848; or

2. The property was used or intended to be used in any manner or part to commit or to facilitate the commission of a violation of those statutes; or

3. With respect to Bosko Struminikovski, the property constituted an interest in, claim against, or contractual right affording a source of control over the continuing criminal enterprise charged in the indictment.

You are further instructed with respect to the forfeiture allegations, that if you find that any of the property set out therein is the property of defendants Bosko Struminikovski or Vasil Struminikovski and that the Government has established *by a preponderance of the evidence* that:

1. Such property was acquired by such person during the period of a violation of Title 21 United States Code Sections 841(a)(1), 845b(f), 846, or 848 or within a reasonable time after such period; and

2. There was no likely source for such property, other than a violation of Title 21 United States Code Sections 841(a)(1), 845b(f), 846, or 848, then a rebuttable presumption arises that the property is subject to forfeiture.

Tr. at 5509-5511.

As a preliminary matter we note that no objection was raised to the forfeiture instruction by the defense at trial. Therefore we will evaluate this challenge only for "plain error." *See* Fed. R. Crim. P. 52(b); *United States v. Medley*, 913 F.2d 1248, 1260 (7th Cir. 1990). We review the entire record to determine "whether or not the defective instruction had a probable impact on the jury's finding of guilt," and will reverse only if we find a miscarriage of justice. *Id.*

We find, first, that the court's forfeiture instruction follows very closely the statutory language of 21 U.S.C. § 853.[17] It adapts subsection (a) when describing the property subject to forfeiture in the first half of the instruction, and mimics subsection (d), the "rebuttable presumption" subsection, in the second half of the instruction given to the jury. The defendants have declined to challenge the statute itself, the constitutionality of which we upheld in *United States v. Herrero*, 893 F.2d 1512 (7th Cir.), *cert. denied*, 110 S. Ct. 2623 (1990). The only difficulty in the instruction is the court's insertion of the "reasonable doubt" standard.

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[17] The criminal forfeiture provision, 21 U.S.C. § 853, states:

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter . . . shall forfeit to the United States . . .

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

* * *

(d) Rebuttable presumption

There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter . . . is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this subchapter . . . or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this subchapter. . . .

In *Herrero* this court drew a clear distinction between the burdens required (1) to prove the substantive crime of which the defendant was convicted and (2) to support the government's seizure of the convicted person's forfeitable property.

> Forfeiture is not an element of the offense, but only punishment for an offense upon which a conviction has already been entered.

Id. at 1541, citing *United States v. Sandini*, 816 F.2d 869, 874-76 (3rd Cir. 1987), *cert. denied sub nom. Pryba v. United States*, 111 S. Ct. 305 (1990) ("argument that forfeiture is an element which must be proved beyond a reasonable doubt confuses culpability with consequences"). The jury finds the defendant guilty at trial when the elements of the felony are established beyond a reasonable doubt. Once the defendant has been convicted under that strict standard, however, he is subject to criminal forfeiture proceedings pursuant to 21 U.S.C. § 853, which requires the government to make its proof by only a preponderance of the evidence.

Under these clearly enunciated standards, therefore, the government was not required to prove beyond a reasonable doubt that Bosko's and Vasil's assets were property derived from drug-related proceeds and thus subject to forfeiture. But the major portion of the instruction was given in clear accordance with the statute, and the burden of proof explained at great length by the court was the "preponderance" standard. The only complaint that could thus be raised is the higher hurdle placed before the government, not the defendants. The use of that stricter burden of proof probably had no impact on the jury's finding; it was harmless error and certainly does not change the forfeiture determination below. *See United States v. Pace*, 898 F.2d 1218, 1235 n.5 (7th Cir.), *cert. denied sub nom. Cialoni v. United States*, 110 S. Ct. 3286 (1990). We hold that there was no plain error in the district court's forfeiture instruction to the jury.

VI. Fatal variance

Defendant Deborah Cerveny admits that she was a drug addict, a "hanger-on" who took free cocaine from Bosko, but insists that she was not a member of the conspiracy. The evidence at trial indicated that she made a sale to an undercover agent, accepted rides to La Petite restaurant to get cocaine, and delivered a message from Bosko to two co-conspirators in jail. Cerveny asserts that the evidence proved only that she exercised terrible judgment but not that she was a conspirator. However, if the court should find that she was a conspirator, Cerveny contends that she and Bosko engaged in a separate scheme, and challenges the sufficiency of the evidence of her participation in the overall conspiracy charged in Count 2.

The government points out that Cerveny pleaded guilty to two substantive delivery charges before trial,[18] and that at trial one of those deliveries was introduced in evidence as proof of the act demonstrating that Cerveny was selling Bosko's cocaine. It asserts that Cerveny's frequent trips to La Petite and her presence with Bosko at other locations after La Petite closed were valuable circumstantial evidence of her knowledge of the conspiracy. And the fact that she sold Bosko's cocaine indicates that she joined the conspiracy.

Defendant Cerveny presents bifurcated contentions: The evidence at trial was either insufficient to support her conviction on Count 2, alleging one large conspiracy, or sufficient to support only a small conspiracy between herself and Bosko. And, if the latter theory is correct, then there was a variance between the overall conspiracy alleged in the indictment and the proof of a separate conspiracy at trial. We can consider both arguments at once, however; for, when the issue is either insufficiency of the evidence or variance, our starting point on appeal must be the

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[18] Defendant Cerveny entered a guilty plea on Count 3, distribution of 3.7 grams of cocaine with Bosko, and Count 4, distribution of 1.6 grams of cocaine.

jury's determination that Cerveny was a member of the all-encompassing conspiracy. Moreover, our review of that verdict has been clearly defined by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979): "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319, 99 S. Ct. at 2789.

> We have in the past noted that a conspiracy variance claim amounts to a challenge to the sufficiency of the evidence supporting the jury's finding that each defendant was a member of the same conspiracy. Whether a single conspiracy exists is a question of fact; consequently "[t]he jury gets first crack at deciding 'whether there is one conspiracy or several when the possibility of a variance appears.' " This is because the jury's verdict must be interpreted as a finding that the government presented sufficient evidence to prove its indictment beyond reasonable doubt, and that is all that we require of the prosecution.

United States v. Townsend, 924 F.2d 1385, 1389 (7th Cir. 1991) (citations omitted). If we find that a jury reasonably could have found Cerveny guilty of conspiracy under Count 2, then we must uphold the verdict, even if the evidence might also indicate a smaller conspiratorial relationship between Cerveny and Bosko.

> The fact that the government's evidence might also be consistent with an alternate theory is irrelevant; the law does not require the government to *disprove* every conceivable hypothesis of innocence in order to sustain a conviction on an indictment proved beyond reasonable doubt. Consequently, "even if the evidence arguably establishe[d] multiple conspiracies, there [is] no material variance from an indictment charging a single conspiracy if a reasonable trier of fact could have found beyond a reasonable doubt the

existence of the single conspiracy charged in the indictment."

Id. (citations omitted).

By the terms of 21 U.S.C. § 846, a conspiracy has two essential elements: an agreement and an intention to violate the Controlled Substance Act. " 'The gist of the crime of conspiracy as defined by the statute is the agreement . . . to commit one or more unlawful acts,' from which it follows that 'the precise nature and extent of the conspiracy must be determined by reference to the agreement which embraces and defines its objects.' " *United States v. Broce*, 488 U.S. 563, 570, 109 S. Ct. 757, 102 L.Ed.2d 927 (1989), quoting *Braverman v. United States*, 317 U.S. 49, 53, 63 S. Ct. 99, 87 L.Ed. 23 (1942). "A single agreement to commit several crimes constitutes one conspiracy. By the same reasoning, multiple agreements to commit separate crimes constitute multiple conspiracies." *Id.* at 570-71.

We have reviewed the record to determine whether there was substantial evidence at trial of Cerveny's participation in the broad conspiracy. *United States v. Auerbach*, 913 F.2d 407, 414 (7th Cir. 1990), citing *United States v. Durrive*, 902 F.2d 1221, 1229 (7th Cir. 1990) ("substantial" evidence needed for proof of individual's participation in conspiracy). Preliminarily we note that the defendant's guilty pleas concerned two sales of cocaine made in October and November of 1985, and that she is named in Count 2 of the indictment only in the second paragraph that describes the conspiracy during the latter part of 1985. The evidence at trial, however, clearly indicated Cerveny's long-term and deeper involvement.

First, the undercover police officer Caudill testified that Cerveny set the rules to be followed for the cocaine purchase. She made clear that the person delivering the cocaine would not meet customers because he was "paranoid" after a recent arrest. The evidence showed that Bosko (who had been arrested several months earlier) drove up in the white Riviera that Cerveny had been ex-

pecting. Five minutes after following Bosko into the United Grill Cerveny brought the cocaine to agent Caudill. She sold him 3.7 grams of cocaine for $275 and returned to the restaurant with the payment.

A jury could reasonably find that this evidence was sufficient to demonstrate that Cerveny knew of Bosko's drug distribution scheme at that time, and that she intended to associate herself with its purpose by selling the cocaine to Caudill. This court has held that the middleman (or, in this case, middlewoman) in a drug transaction, " 'one who buys from a conspirator for resale[,] is a member of the conspiracy if he knows at least its general aims. . . .' " *Auerbach*, 913 F.2d at 415, quoting *United States v. Marks*, 816 F.2d 1207, 1212 (7th Cir. 1987).

Even though Cerveny's direct contact with Bosko might support a theory that she and Bosko had established their own separate conspiracy, Cerveny's explanations to Caudill of her drug dealings with Bosko suggest a close working relationship that belies her claim that she was unaware of the overall conspiracy. *See Auerbach, supra.* In addition to this "overt act in furtherance of the conspiracy" was the evidence that Cerveny was present among the conspirators throughout the period alleged in Count 2 and was defendant Suchan's girlfriend for a time. In 1986 she was reported to frequent La Petite, and in 1987 she was often seen with Bosko and others at various restaurants. According to testimony she purchased cocaine at Bosko's house as well, sometimes even trading clothing for cocaine. Finally, her statements to two other co-conspirators who pleaded guilty and testified on behalf of the government suggested full knowledge of the conspiracy and participation in it.

There was, therefore, sufficient evidence for the jury to find that Cerveny's cocaine sales constituted knowing participation in the conspiratorial scheme and furtherance of the goals of the conspiracy, which were the buying and reselling of narcotics. It does not matter that the government offered no evidence of further sales by Cerveny.

Once there was evidence of the 1985 sales, Cerveny's statements reflecting her knowledge of the operation and her continuing association with the conspirators were sufficient to establish that she was a member of the larger conspiracy. *See United States v. Paiz*, 905 F.2d 1014, 1020 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1319 (1991); *United States v. Sophie*, 900 F.2d 1064, 1080-81 (7th Cir.), *cert. denied sub nom. Duque v. United States*, 111 S. Ct. 124 (1990).

Cerveny has failed to show that the evidence was insufficient to prove either a single overall conspiracy or her participation in it. The indictment charged a single conspiracy; the evidence proved both a single conspiracy to distribute illegal controlled substances and Cerveny's membership in the conspiracy. Therefore the defendant has failed to prove any variance between the indictment and the trial evidence in this case. Her conviction for participation in the conspiracy alleged in the indictment was proper.

CONCLUSION

We find that the various allegations of the defendants herein were unsuccessful on appeal. For the foregoing reasons, the conviction of each of the defendants herein is AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: May 3, 1991

BEFORE:
Honorable Walter J. Cummings, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Robert A. Grant, Senior District Judge*

Nos. 88-3412, 88-3479, 88-3480, 88-3513,
88-3514, 88-3515, 88-3522, and 89-1094

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DOMINIC SIMONE, ROBERT "BOSKO"
STRUMINIKOVSKI, NICHOLAS SIMONE, et al.,

Defendants-Appellants

Appeals from the United States District Court
for the Northern District of Illinois
No. 87 C 669, Judge Ilana D. Rovner

These causes were heard on the record from the above mentioned district court, and were argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in these causes appealed from be, and the same are hereby, AFFIRMED, in accordance with the opinion of this Court filed this date.

---

* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 5, 1991.

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. ROBERT A. GRANT, *Senior District Judge**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 88-3479 vs.

ROBERT "BOSKO" STRUMINIKOVSKI,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 CR 669—Ilana D. Rovner, *Judge.*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing *en banc* filed by Robert "Bosko" Struminikovski on May 16, 1991, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Robert A. Grant, Senior District Judge for the Northern District of Indiana, is sitting by designation.

(2)

No. 91-411

In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT "BOSKO" STRUMINIKOVSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner was deprived of the effective assistance of counsel when, during closing argument, his trial attorney acknowledged the facts underlying the less serious charges while vigorously disputing the more serious charges.

2. Whether, in assessing petitioner's claim of ineffective assistance of counsel, the court of appeals erred in relying on a document that petitioner brought to the court's attention.

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ROBERT "BOSKO" STRUMINIKOVSKI, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 931 F.2d 1186.

JURISDICTION

The judgment of the court of appeals (Pet. App. 28a) was entered on May 3, 1991. A petition for rehearing was denied on June 5, 1991. Pet. App. 29a. The petition for a writ of certiorari was filed on September 3, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (Count 1);

conspiring to distribute cocaine and heroin and to possess cocaine and heroin with intent to distribute them, in violation of 21 U.S.C. 846 (Count 2); distributing cocaine, in violation of 21 U.S.C. 841(a)(1) (Counts 3, 5, 6, 7, 8, 9, 11); possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 12 and 14); distributing cocaine to a pregnant woman, in violation of 21 U.S.C. 845b(f) (Count 10); possessing heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 15); possessing morphine, in violation of 21 U.S.C. 844 (Count 16); offering a bribe to a public official, in violation of 18 U.S.C. 201(b)(1) (Count 13); possessing firearms in connection with drug trafficking crimes, in violation of 18 U.S.C. 924(c) (Count 17); and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) (Count 18).[1] He was sentenced to a total of 23 years' imprisonment, to be followed by 38 years' supervised release, and was fined $140,000. The court of appeals affirmed. Pet. App. 1a-27a.

1. From the summer of 1984 through August 1987, petitioner headed an operation that distributed cocaine and heroin in the Cicero, Illinois, area. Petitioner and his subordinates ran the drug operation out of various restaurants and petitioner's residence. Co-defendant Lubin Milevski supervised the drug

[1] Petitioner stood trial with co-defendants Dominic Simone, Nicholas Simone, John Peter Suchan, Vasil Struminikovski, Panagiotis "Pete" Pistas, Deborah Cerveny, and Lubin Milevski, all of whom were convicted on the conspiracy count and various substantive drug offenses. Pet. App. 2a-3a & nn.1-2. Their convictions were affirmed in the opinion below. Four other co-defendants—Carmella Viola, Brenda Parson, Amanda Roland, and Vito Cancialosi—pleaded guilty and testified for the government at trial. *Id.* at 2a n.1.

operation during the day, and petitioner supervised it at night. The other co-defendants assisted in selling the drugs and acting as lookouts. Pet. App. 2a, 3a-5a; Gov't C.A. Br. 7-9.

Tom Kelly, an agent of the Drug Enforcement Administration working undercover, made several purchases of cocaine from petitioner's operation. In March and April 1986, Agent Kelly bought 45.42 grams and 56.4 grams of cocaine from petitioner. C.A. App. 12, 13. In March 1987, Kelly bought 55 grams of petitioner's cocaine from co-defendant John Suchan. In July and August 1987, Kelly negotiated with petitioner and Suchan for the sale of 2.3 kilograms of petitioner's cocaine. On August 28, 1987, petitioner had the cocaine delivered to Kelly by co-defendant Amanda Roland, who was eight and a half months pregnant at the time. Roland was arrested after delivering the cocaine, and petitioner and Suchan were arrested later that night. At the time of his arrest, petitioner offered a bribe to the arresting officers. A search of petitioner's house yielded quantities of cocaine, heroin, and morphine, as well as guns and cash. Pet. App. 5a-6a; Gov't C.A. Br. 9-10.

2. In his opening statement at petitioner's trial, counsel for petitioner acknowledged that petitioner had done "something wrong," but counsel maintained that petitioner had acted alone, and not in conjunction with others or as the head of a criminal enterprise. Pet. App. 15a. Thereafter, 15 witnesses testified that they had bought cocaine from petitioner or his co-conspirators or had seen petitioner selling cocaine. Gov't C.A. Br. 37 n.20. In his closing argument, petitioner's counsel acknowledged that petitioner had sold drugs, but counsel steadfastly main-

tained that petitioner had done so "by himself." Pet. App. 15a; Gov't C.A. Br. 37 & n.21. Both in his closing argument and during trial, counsel vigorously argued that petitioner was not guilty of the conspiracy or the continuing criminal enterprise charges. Counsel likewise maintained that petitioner was innocent of the other charges that carried enhanced or mandatory minimum penalties. Pet. App. 14a-15a & n.10.

3. On appeal, petitioner retained new counsel and argued that he had been deprived of the effective assistance of counsel at trial. The court of appeals rejected that argument and affirmed petitioner's convictions.[2] The court determined from the trial transcript that in the closing argument petitioner's trial counsel conceded only the facts that had been established by "indisputable evidence and credible testimony." Pet. App. 14a. At the same time, the court found, trial counsel "vigorously contested the most serious charges, such as conspiracy and continuing [criminal] enterprise." *Id.* at 15a. The court concluded that this was a "logical trial strategy" in light of the "overwhelming evidence of drug trafficking * * * introduced at trial." *Ibid.* The court also determined that petitioner had concurred in that strategy. *Id.* at 16a-18a. The court observed that the strategy was "evident from the beginning of the trial" and "[a]t no time did [petitioner] object to it." *Id.* at 18a. The court also relied on a post-trial letter from petitioner to the trial judge, which petitioner cited in his brief to the court of appeals. *Id.* at 16a & n.11. The court determined that the letter

[2] In addition to his claim of ineffective assistance of counsel, petitioner advanced other arguments that the court of appeals considered and rejected. Pet. App. 2a, 6a-11a, 19a-22a. Petitioner does not renew those arguments in this Court.

"made clear" that the tactics employed by petitioner's counsel at trial "followed [petitioner's] approach by denying the conspiracy while conceding [petitioner's] own undeniable drug transactions." *Id.* at 16a.[3]

ARGUMENT

1. Petitioner contends (Pet. 5-21) that he was deprived of the effective assistance of counsel by his trial counsel's decision in closing argument to acknowledge the factual elements of certain charges. The court of appeals correctly rejected that contention, and its decision does not conflict with any decisions of this Court or other courts of appeals.

To establish a claim of ineffective assistance of counsel, a criminal defendant must show both that his counsel's performance was deficient and that the deficiency prejudiced the defense. *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984). To make the first showing, the defendant must overcome a strong presumption that counsel rendered adequate assistance by demonstrating that counsel's representation fell outside the "wide range of professionally competent assistance." *Id.* at 690. Moreover, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding" unless "there is a reasonable probability that, but for counsel's unprofessional errors, the re-

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[3] Having concluded that petitioner had not met his burden of proving that his trial counsel's performance was deficient, the court found it unnecessary to consider whether the asserted deficiencies caused petitioner prejudice. Pet. App. 19a n.16 (citing *Strickland* v. *Washington*, 466 U.S. 668 (1984)). The court noted, however, that petitioner "did not argue that the jury's decision would probably have been different absent his counsel's alleged errors." Pet. App. 19a n.16.

sult of the proceeding would have been different." *Id.* at 691, 694. Thus, "[f]ailure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." *Id.* at 700.

Petitioner did not argue below, and does not argue in this Court, that his trial counsel's strategy prejudiced his defense. Pet. App. 19a n.16. Under *Strickland* it is clear that petitioner's failure to do so, standing alone, is fatal to his claim of ineffective assistance of counsel. See 466 U.S. at 696 ("a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors").[4]

In any event, the court of appeals correctly concluded that petitioner also "failed to show that the conduct of his trial counsel * * * fell below an objective standard of reasonableness." 931 F.2d at 1197.[5] As the court below explained, because the evidence of petitioner's drug trafficking was "overwhelming," it would have been "foolhardy for [petitioner's] counsel to deny the drug sales so credibly proven by the government." Pet. App. 15a, 18a. In the face of that evidence, it was not unreasonable for counsel to acknowledge that the drug sales occurred. As the courts have recognized, a defense counsel may reason-

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[4] In *Strickland*, 466 U.S. at 692, the Court indicated that prejudice may be presumed with regard to certain categories of claims of ineffective assistance, but petitioner's claim does not fall into any of those categories. See also *United States* v. *Cronic*, 466 U.S. 648, 658-662 (1984).

[5] The reported version of the decision below is cited in the text because the reported version corrects an apparent grammatical error in the slip opinion. See Pet. App. 19a.

ably conclude that such an approach is the only way of preserving credibility before the jury. *Messer* v. *Kemp*, 760 F.2d 1080, 1090 (11th Cir. 1985), cert. denied, 474 U.S. 1088 (1986); see also *United States* v. *Leifried*, 732 F.2d 388, 390 (4th Cir. 1984) (decision of defense counsel to "admit guilt on individual drug trafficking offenses where the evidence of guilt was overwhelming and attempt to persuade the jury of [the defendant's] innocence of the continuing criminal enterprise charge was acceptable trial strategy"). Petitioner's counsel reasonably could conclude that, by preserving his credibility with respect to the lesser charges, he had a better chance of obtaining an acquittal on the more serious charges.

Petitioner argues (Pet. 8-11) that his trial counsel's strategy was impermissible under this Court's decisions in *Brookhart* v. *Janis*, 384 U.S. 1 (1966), and *United States* v. *Cronic*, 466 U.S. 648 (1984). Petitioner's reliance on those decisions is misplaced.

In *Brookhart*, the defense counsel consented to a summary trial procedure in which the prosecutor made only a *prima facie* showing of guilt and the defense was not permitted to offer any evidence or cross-examine any witnesses. 384 U.S. at 2-3. The defendant, however, asserted on the record that he wanted to "have a trial in which he [could] confront and cross-examine the witnesses against him." *Id.* at 7. The Court in *Brookhart* held that the defendant's attorney could not override the defendant's expressed desire to exercise his right to confront and cross-examine the witnesses against him. *Id.* at 7-8.

The holding in *Brookhart* clearly does not apply here. In *Brookhart*, the defendant's lawyer did not put on any defense. The practical effect was that counsel "overr[o]de his client's desire expressed in

open court to plead not guilty." *Brookhart*, 384 U.S. at 7-8. Here, in contrast, defense counsel put the government to its proof on all counts. Then, faced with overwhelming evidence of certain lesser charges, counsel reasonably decided to contest only the most serious charges. See Pet. App. 15a-16a, 18a. As the court of appeals observed, that tactic was part of a "reasonable plan that was evident from the beginning of the trial." *Id.* at 18a. No similar tactical considerations could explain the complete abdication of a defense at issue in *Brookhart*. Moreover, in contrast to the record in *Brookhart*, the record in this case indicates that petitioner concurred in his trial counsel's strategy. Pet. App. 16a-18a. *Brookhart* is thus inapposite.

Petitioner also relies (Pet. 9) on the Court's statement in *United States* v. *Cronic*, 466 U.S. at 656-657 n.19, that "when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." The Court in *Cronic* went on, however, to state that "[i]f there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *Ibid.* That observation fully applies here. As the court of appeals recognized, petitioner's trial counsel could only have disserved petitioner's interests by "deny[ing] the drug sales so credibly proven by the government." Pet. App. 18a. Thus, nothing in *Cronic* precludes the tactical decision that counsel for petitioner made here.

Petitioner's reliance on lower court decisions is likewise misplaced. In both of the decisions on which petitioner principally relies (Pet. 13, 16-17), the defense counsel admitted in closing argument that the defendant was guilty on *all* of the charges against

him and argued only for leniency. *Francis* v. *Spraggins*, 720 F.2d 1190, 1193-1195 (11th Cir. 1983), cert. denied, 470 U.S. 1059 (1985); *Wiley* v. *Sowders*, 647 F.2d 642, 648-651 (6th Cir.), cert. denied, 454 U.S. 1091 (1981). Thus, *Spraggins* and *Wiley*, like *Brookhart*, involved complete surrenders of a defense; like *Brookhart*, they are inapposite for that reason. As the Sixth Circuit observed in *Wiley*, there is a difference between a "tactical retreat" and a complete "surrender of the sword." 647 F.2d at 649. The Eleventh Circuit similarly emphasized in a decision subsequent to *Spraggins* that "it is a '*complete* concession of the defendant's guilt' which constitutes ineffective assistance." *Messer*, 760 F.2d at 1090 n.6 (quoting, with emphasis, *Spraggins*, 720 F.2d at 1194).[6] Here, "rather than concede guilt completely, [petitioner's counsel] competently challenged the prosecution's proof" on the most serious charges. Pet. App. 18a.

Spraggins and *Wiley* are inapposite for another reason. There was no evidence in either case that the defendant consented to his trial counsel's concessions. *Spraggins*, 720 F.2d at 1193 (counsel's concession of guilt conflicted with defendant's testimony denying involvement in the offense charged); *Wiley*, 647 F.2d at 650 (concessions were made without defendant's consent). Here, in contrast, the court of appeals determined that petitioner's counsel "was following his client's wishes." Pet. App. 17a. Petitioner challenges that determination on the ground

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[6] See also *McNeal* v. *Wainwright*, 722 F.2d 674, 675-676 (1984), in which the Eleventh Circuit held that defense counsel's decision to concede that his client committed manslaughter, but not first degree murder, did not deprive the defendant of the effective assistance of counsel.

that his consent was not obtained on the record and after judicial inquiry to ensure that the consent was knowing and voluntary. Pet. 9-11. None of the case law on which petitioner relies, however, supports imposing such a procedure in this context. While the court in *Wiley* indicated that such a procedure should be followed when defense counsel completely concedes his client's guilt to the charges, 647 F.2d at 650, the court did not suggest that the same requirement should apply when, as in this case, the defendant's attorney concedes some of the lesser charges in the reasonable belief that doing so maximizes the chance of proving innocence as to the more serious charges.[7]

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[7] Like *Wiley* and *Spraggins*, *Lobosco* v. *Thomas*, 928 F.2d 1054, 1056 (11th Cir. 1991), involved a complete concession by defense counsel that defendant was guilty as charged in the indictment. Thus, the suggestion in *Lobosco* that the defendant's consent to such a concession should be on the record does not apply here. *Id.* at 1057. In addition, that suggestion was clearly dictum, since the *Lobosco* court determined that consent had been obtained—and accordingly rejected the claim of ineffective assistance of counsel—based on the deposition of the defense counsel. *Ibid.* The other cases on which petitioner relies (Pet. 18-19) are even wider of the mark. In *Mullins* v. *Evans*, 622 F.2d 504, 506 (10th Cir. 1980), the defendant's lawyer went beyond conceding his client's guilt; he argued that the defendant should be convicted of first degree murder rather than the lesser charges. *Cox* v. *Hutto*, 589 F.2d 394 (8th Cir. 1979), and *United States* v. *Brown*, 428 F.2d 1100 (D.C. Cir. 1970), involved stipulations by defense counsel. The stipulations in *Cox* conceded the defendant's guilt as to the most serious charge—that of being a habitual offender—for which, in addition to a two-year sentence for burglary, the defendant received a 31-year sentence. 589 F.2d at 395-397. The stipulations in *United States* v. *Brown* admitted that the defendant committed all of the acts charged in the indictment. 428 F.2d at 1101-1102.

2. Petitioner further contends (Pet. 21-27) that, in assessing his claim of ineffective assistance of counsel, the court of appeals improperly engaged in fact-finding by relying on a post-trial letter from petitioner to the trial judge. Petitioner is in no position to raise that contention here, however, because it was petitioner who brought the letter to the court of appeals' attention. Pet. App. 16a n.11, citing Pet. Supp. C.A. Br. 22 n.29. Petitioner cannot have it both ways; having used the letter in an attempt to buttress his claims, petitioner cannot now complain merely because that attempt backfired.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

LOUIS M. FISCHER
Attorney

NOVEMBER 1991

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No. 91-411

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT "BOSKO" STRUMINIKOVSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF

ALLAN A. ACKERMAN
Counsel of Record
JOELLE H. HOLLANDER
2000 North Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorneys for Petitioner
ROBERT "BOSKO" STRUMINIKOVSKI

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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IN THE

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OCTOBER TERM, 1991

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF

STATEMENT OF THE CASE

Petitioner Bosko Struminikovski (Bosko) was convicted after an eight-week jury trial on a series of charges including continuing criminal enterprise, use of a firearm in relation to drug trafficking, and attempted bribery (21 U.S.C. § 848, 18 U.S.C. § 924(c), § 201(b)(1)). The continuing criminal enterprise charge alleged drug trafficking in violation of 21 U.S.C. § 841(a)(1), 21 U.S.C. § 845b(f), and § 846.

Trial proceedings produced evidence which variously showed an enterprise bent on the sale of $25 bags of cocaine out of Chicago area restaurants, with Bosko as the ostensible head of the organization. Beginning in 1984, Bosko and girl-friend Amanda Roland travelled to Florida and arranged for the transport of a quantity of cocaine from Florida to Chicago. (Tr. 670-71) That journey touched off a course of conduct involving regular distributions of cocaine. Distribution spots included the United Grill (Tr. 1239, 1242-53) and La Petite Restaurant. (Tr. 2611-22) While the food service business *per se* was questionable at best, La Petite nevertheless drew traffic jams most weekends caused by eager cocaine-purchasing-patrons. (Tr. 2586-2600)

Infiltration by an undercover D.E.A. agent ultimately put an end to the organization in 1986 and led to Bosko's arrest. (Tr. 3228-36, 3337-38, 3343)

Bosko proceeded to a joint jury trial with retained counsel, yet counsel's adherence to Bosko's not-guilty plea took the form of repeated declarations that Bosko was a dope dealer, systematically piling all the evidence of that dope dealing in front of Bosko while extolling Bosko's guilt. (A sampling of closing argument excerpts made on Bosko's behalf is reproduced in Bosko's opening petition for writ of certiorari at pp. 5-8).

Ultimately, the jury heeded defense counsel's argument and convicted Bosko on all counts. Bosko was sentenced to a total of 23 years in custody along with fines totaling $140,000. (R. 598)

REASON FOR ALLOWANCE OF THE WRIT

WHETHER THE SPLIT IN CIRCUITS AS TO DEFENSE COUNSEL'S ASSERTION OF HIS CLIENT'S GUILT IN A FEDERAL CRIMINAL TRIAL MANDATES SUPREME COURT REVIEW AND DISPOSITION.

As set out in his Opening Petition for Writ of Certiorari, Bosko argues that the appellate court's decision on this issue not only breaks with Seventh Circuit case law, *see Achtien v. Dowd*, 117 F.2d 989, 993 (7th Cir. 1941), but also fuels a split in circuits on the propriety of defense counsel conceding/stipulating a client's guilt in the face of a not-guilty plea.

The latest pronouncement on the issue of counsel's concessions of guilt hails from the Ninth Circuit in *United States v. Swanson*, 943 F.2d 1070 (9th Cir. 1991), which reversed defendant's bank robbery conviction. In *Swanson*, defense counsel conceded the lack of any reasonable doubt on the one count of bank robbery for which Swanson was tried. *Id.* at 1071. Counsel further argued that he did not want to insult the intelligence of the jury by trying to raise a reasonable doubt, and that the jury should not hesitate if they believed the right verdict to be guilty. *Id.* at 1077-78.

In its analysis, the *Swanson* court found a deprivation of both Due Process (5th amendment) and effective assistance of counsel (6th amendment) which was prejudicial *per se*. *Id.* at 1073-74. Starting with the basic tenets of *Strickland v. Washington*[1], and the prejudice-exception of

[1] 466 U.S. 668 (1984).

United States v. Cronic[2], the court noted that failure to hold the government to its proof—beyond a reasonable doubt—is inconsistent with Due Process, and constituted "an abandonment of the defense of his client at a critical stage of the criminal proceedings". *Swanson*, 943 F.2d at 1073-74. Moreover, *Swanson* noted that the government in that case had failed to offer up any strategy to justify defense counsel's "betrayal of his client". *Id.* at 1075.

At bar the government attempts to curry credibility for defense counsel's concessions of Bosko's guilt by adopting the appellate court's reasoning that because the evidence on the conceded counts was "overwhelming", "it would have been 'foolhardy for [petitioner's] counsel to deny the drug sales so credibly proven by the government.' " (Brief in Opposition, p. 6)[3]

Close consideration of the severity of the conceded counts shows grim sentencing consequences. Bosko's counsel con-

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[2] 466 U.S. 648 (1984). *Cronic* allows for a presumption of prejudice where an "actual breakdown" in the adversary process at trial occurs. *See Swanson*, 943 F.2d at 1072 (*citing Toomey v. Bunnell*, 898 F.2d 741, 744 n.2 (9th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S.Ct. 390 (1990).

[3] The government fails to alert the Court to that segment of the opinion below which reiterates that one of Bosko's joint-trial co-defendants, Debbie Cerveny, pled guilty to certain counts of the indictment *PRIOR TO THE JOINT JURY TRIAL, 931 F.2d at 1199, n.18—AND MS. CERVENY CONTESTED ONLY HER CONSPIRATORIAL MEMBERSHIP COUNT (COUNT 2) WITHIN THE FABRIC OF THE MULTI-DEFENDANT, MULTI-JURY TRIAL.*

The above is clearly a constitutionally-acceptable approach consistent with *Boykin v. Alabama*, 395 U.S. 238 (1969) and *Brookhart v. Janis*, 384 U.S. 238 (1969); such posturing of submitting Bosko's guilty pleas to selected counts pre-trial was certainly available to defense counsel below.

ceded counts 7, 8, 9, 11, 13, 14, 15, 17, and 18. (*See* Tr. 5321) Counts 7, 8, 9, 11, 14, and 15 were charged per 21 U.S.C. § 841(a)(1) and carried potential penalties of 15 years per count, or 90 years in custody. Count 13 charged a violation of 18 U.S.C. § 201(b)(1) (attempted bribery of a public official) which carries a permissive 5 year custodial sentence. Counts 17 and 18 charged federal weapon violations; the § 924(c) count (Count 17) compelled a 5 year consecutive sentence while the § 922(g)(1) count (Count 18—felon in possession of a firearm) carries a 10 year custodial sentence. Hence, the cumulative permissive penalties on the conceded counts totaled 105 years in custody. Concession of multiple counts which carry such custodial sentencing potential can hardly add up to "logical trial strategy". (*See* Brief in Opposition, p. 4).

Clearly, it is established that this Court has never conditioned the right to counsel on actual innocence—"the constitutional rights of criminal defendants are granted to the innocent and the guilty alike". *See Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986). As applied to Bosko Struminikovski, the question of prejudicially ineffective assistance of counsel is open, per the current split in circuits, and merits review.

CONCLUSION

Because of the fundamental 5th and 6th amendment questions raised, as well as the split in circuits presented in the Petition and in this Reply, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ALLAN A. ACKERMAN
Counsel of Record
JOELLE H. HOLLANDER
2000 North Clifton Avenue
Chicago, Illinois 60614
(312) 332-2891

Attorneys for Petitioner
ROBERT "BOSKO" STRUMINIKOVSKI